CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 36 SEPTEMBER 4, 2002 NO. 36

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

19 CFR Part 177

(T.D. 02–49)

RIN 1515–AC56

ADMINISTRATIVE RULINGS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; correction.

SUMMARY: This document makes two corrections to the document published in the Federal Register on August 16, 2002, as T.D. 02–49 which set forth final amendments to those provisions of the Customs Regulations that concern the issuance of administrative rulings and related written determinations and decisions on prospective and current transactions arising under the Customs and related laws.

EFFECTIVE DATE: These corrections are effective August 16, 2002.

FOR FURTHER INFORMATION CONTACT: John Elkins, Textiles Branch, Office of Regulations and Rulings (202–572–8790).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 16, 2002, Customs published in the Federal Register (67 FR 53483) T.D. 02–49 to set forth final amendments to those provisions of the Customs Regulations that concern the issuance of administrative rulings and related written determinations and decisions on prospective and current transactions arising under the Customs and related laws. The regulatory changes involve primarily the addition of a new § 177.12 to set forth procedures regarding the modification or revocation of rulings on prospective transactions, internal advice decisions, protest review decisions, and treatment previously accorded by Customs to substantially identical transactions. The amendments are in response to statutory changes made to the administrative ruling process by section 623 of the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act and take effect on September 16, 2002.

This document makes two corrections to cross-reference citations within paragraphs (c) and (d) of § 177.12.

Corrections of Publication

The document published in the Federal Register as T.D. 02–49 on August 16, 2002 (67 FR 53483) is corrected as set forth below.

§ 177.12 [Corrected]

1. On page 53498, in the first column, in § 177.12, the first sentence of paragraph (c)(2)(ii) is corrected by removing the reference "§ 177.19" and adding, in its place, the reference "§ 177.9".

2. On page 53498, in the second column, in § 177.12, paragraph (d)(1)(viii) is corrected by removing the reference "§ 177.22 of this part" and adding, in its place, the reference "§ 177.10(c)".

Dated: August 20, 2002.

HAROLD SINGER,
Chief,
Regulations Branch.

[Published in the Federal Register, August 26, 2002 (67 FR 54733)]

U.S. Customs Service

General Notices

NOTICE OF CANCELLATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 USC 1641) and the Customs Regulations (19 CFR 111.51), the following Customs broker licenses and any and all associated local and national permits are canceled without prejudice.

Name	*License No.*	*Port Name*
Arthur J. Humphries, Inc.	04197	Seattle
Inter-Cargo SWF	17455	Tampa
Liberty International, Inc.	07491	Boston
Stone & Downer Company	00161	Boston
Border Brokerage Company, Inc.	03389	Seattle
Unitrans International Corporation	06728	San Francisco

Liberty International, Inc. and Unitrans International Corporation continue to hold valid Customs broker licenses issued through other broker districts.

Dated: August 12, 2002.

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, August 20, 2002 (67 FR 54020)]

NOTICE OF CANCELLATION OF CUSTOMS BROKER PERMIT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 USC 1641) and the Customs Regulations (19 CFR 111.51), the following Customs broker local permits are canceled without prejudice.

Name	*Permit No.*	*Port Name*
Arthur Andersen LLP	94–037	Los Angeles
Murphy International Corp.	153	Seattle
James P. Cesped	04581–P	San Francisco

Dated: August 12, 2002.

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, August 20, 2002 (67 FR 54020)]

NOTICE OF REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930 as amended (19 USC 1641) and the Customs Regulations [19 CFR 111.45(a)], the following Customs broker license is revoked by operation of law.

Name	*License No.*	*Port*
A.S.I. Customs Brokers, Inc.	21025	New York
Speed Cargo Service, Inc.	20829	Miami

Dated: August 12, 2002.

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, August 20, 2002 (67 FR 54020)]

CANCELLATION OF CUSTOMS BROKER LICENSE DUE TO DEATH OF THE LICENSE HOLDER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Cancellation of License.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 111.51(a), the following individual Customs broker license has been cancelled due to death of the broker:

Name	*License No.*	*Port Name*
Charlotte Patricia Gromberg	13180	Los Angeles
Margaret M. Goldy	10467	Philadelphia

Dated: August 12, 2002.

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, August 20, 2002 (67 FR 54021)]

TREASURY ADVISORY COMMITTEE ON COMMERCIAL OPERATIONS OF THE U.S. CUSTOMS SERVICE

AGENCY: Departmental Offices, Treasury.

ACTION: Notice of meeting.

SUMMARY: This notice announces the date, time, and location for the quarterly meeting of the Treasury Advisory Committee on Commercial Operations of the U.S. Customs Service (COAC), and the provisional meeting agenda.

DATES: The next meeting of the COAC will be held on Friday, September 20, 2002, starting at 9:00 a.m., in Seattle, Washington. The meeting will be held at Microsoft Conference Center, Building 33, (Conference Center), 16070 NE 36th Way, Redmond, WA 98052, for approximately four hours.

FOR FURTHER INFORMATION, CONTACT: Gordana S. Earp, Director, Tariff and Trade Affairs (Enforcement), Office of the Under Secretary (Enforcement), Telephone: (202) 622–0336.

At this meeting, the Advisory Committee is expected to pursue the following draft agenda. The agenda may be modified prior to the meeting.

Agenda:

I. Security:

A. Update on Customs Reorganization; Cargo Security Fees;

B. Update on Supply Chain Security and Customs-Trade Partnership Against Terrorism ("C-TPAT");

II. Other Issues:

A. Report of the Customs Office of Rulings and Regulations;
B. Customs Business Regulations;
C. Focused Assessment and Importer Self-Assessment Programs;

III. Administrative Issues:

A. 2002 Annual Report
B. Update on COAC Re-chartering

SUPPLEMENTARY INFORMATION: The COAC was created by Congress in Public Law 100–203, Title IX, Section 9503(c), December 22, 1987, 100 Stat. 1330–381 (19 U.S.C. 2071 note). The Committee advises the Secretary of the Treasury and reports to Congress any recommendations on matters involving the commercial operations of the United States Customs Service. By statute, the Secretary of the Treasury appoints the members of this Committee, and the Assistant Secretary of the Treasury for Enforcement presides over the meetings.

The September 20, 2002 meeting of the Committee is open to the public; however, participation in the Committee's deliberations is limited to Committee members, Customs and Treasury Department staff, and persons invited to address the meeting for special presentations. A person other than an Advisory Committee member who wishes to attend the meeting should contact Theresa Manning at (202) 622–0220 or Helen Belt at (202) 622–0230.

Dated: August 15, 2002.

GORDANA EARP,
Acting Deputy Assistant Secretary,
Regulatory, Tariff, and Trade.

[Published in the Federal Register, August 23, 2002 (67 FR 54696)]

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 7–2002)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of July 2002. The last notice was published in the CUSTOMS BULLETIN on August 14, 2002.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Joanne Roman Stump, Chief, Intellectual Property Rights Branch, (202) 572–8710.

Dated: August 16, 2002.

JOANNE ROMAN STUMP,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP0200125	20020701	20220701	BVLGARI - CONTEMPORARY ITALIAN JEWELLERS HOLIDAY	BULGARI S.P.A.	N
COP0200126	20020705	20220705	CYBERCLOCK SCREENSAVER	TIME BY DESIGN	N
COP0200127	20020708	20220708	CRAZY MONKEY	MRS, INC (DBA CARESSE)	N
COP0200128	20020710	20220710	LEO BRUINSKI	THE BOYDS COLLECTION LTD.	N
COP0200129	20020710	20220710	CHAMOMILLE Q. QUIGNAPPLE	THE BOYDS COLLECTION LTD.	N
COP0200130	20020710	20220710	S.C. NORTHSTAR	THE BOYDS COLLECTION LTD.	N
COP0200131	20020710	20220710	CLEO PUSSYTOES	THE BOYDS COLLECTION LTD.	N
COP0200132	20020710	20220710	BETTY SPAGHETTY FASHION DOLL	THE OHIO ART COMPANY	N
COP0200133	20020710	20220710	MAMMA MCBEAR & DELMAR	THE BOYDS COLLECTION LTD.	N
COP0200134	20020710	20220710	BATTERY OPERATED VEHICLE PUZZLE PLAY SET - LADY BUG	BIGTREE INC., DBA BIG TREE TOYS	N
COP0200135	20020710	20220710	BATTERY OPERATED VEHICLE PUZZLE PLAY SET - SCHOOL BUS	BIGTREE INC., DBA BIG TREE TOYS	N
COP0200136	20020710	20220710	BATTERY OPERATED VEHICLE PUZZLE PLAY SET - USA MAP	BIGTREE INC., DBA BIG TREE TOYS	N
COP0200137	20020710	20220710	BATTERY OPERATED VEHICLE PUZZLE PLAY SET - WORLD MAP	BIGTREE INC., DBA BIG TREE TOYS	N
COP0200138	20020716	20220716	COOKIE MONSTER	SESAME WORKSHOP	N
COP0200139	20020716	20220716	ERNIE	SESAME WORKSHOP	N
COP0200140	20020716	20220716	BERT	SESAME WORKSHOP	N
COP0200141	20020716	20220716	GROVER	SESAME WORKSHOP	N
COP0200142	20020716	20220716	OSCAR, THE GROUCH	SESAME WORKSHOP	N
COP0200143	20020716	20220716	BIG BIRD	SESAME WORKSHOP	N
COP0200144	20020716	20220716	MR. SNUFFLE-UPAGUS	SESAME WORKSHOP	N
COP0200145	20020716	20220716	TELLY MONSTER	SESAME WORKSHOP	N
COP0200146	20020716	20220716	ELMO	SESAME WORKSHOP	N
COP0200147	20020716	20220716	THE COUNT	SESAME WORKSHOP	N
COP0200148	20020716	20220716	ZOE MONSTER	SESAME WORKSHOP	N
COP0200149	20020719	20220719	CANDOLIER HOLDER	ADAMS MFG CORPORATION	N
COP0200150	20020723	20220723	WORLD TRAVELER	KATHRINE BAUMANN	N
COP0200151	20020723	20220723	LIPS	KATHRINE BAUMMAN	N
COP0200152	20020723	20220723	WATERMELON	KATHRINE BAUMANN	N
COP0200153	20020723	20220723	NEW YORK, NEW YORK	KATHRINE BAUMANN	N
COP0200154	20020723	20220723	BLIZZARD	KATHRINE BAUMANN	N
COP0200155	20020723	20220723	SNOWMAN	KATHRINE BAUMANN	N
COP0200156	20020723	20220723	SMALL CAT FACE WITH GREEN EYES	KATHRINE BAUMANN	N
SUBTOTAL RECORDATION TYPE			32		
TMK0200440	20020701	20100522	ENERGIE BI CURRANTS	MCNAUGHTON APPAREL HOLDINGS INC.	N
TMK0200441	20020701	20071126	CRACKER JACK	RECOT, INC.	N
TMK0200442	20020701	20030702	CHEE.TOS	RECOT, INC.	N
TMK0200443	20020701	20021009	SABRITAS	RECOT, INC.	N
TMK0200444	20020702	20120526	NINTENDO AND RACETRACK DESIGN	NINTENDO OF AMERICA	N
TMK0200445	20020702	20120630	NINTENDO	NINTENDO OF AMERICA	N
TMK0200446	20020702	20111009	MARIO TENNIS	NINTENDO OF AMERICA	N
TMK0200447	20020702	20100829	DVD (PLUS DESIGN)	DVD FORMAT/LOG LICENSING CORP.	N
TMK0200448	20020702	20110925	DESIGN	KAI U.S.A., LTD.	N
TMK0200449	20020703	20070812	CHOIX DES SPORTIFS	COACH'S CHOICE APPAREL	Y
TMK0200450	20020703	20091207	DESIGN (RECTANGULAR WITH TWO BLANK SPACES)	FOX RACING, INC.	N
TMK0200451	20020703	20100627	DESIGN (RECTANGULAR WITH TEFFECTIVESPACES)	FOX RACING, INC.	N
TMK0200452	20020703	20101121	DESIGN (RECTANGULAR WITH TWO BLANK SPACES)	FOX RACING, INC.	N
TMK0200453	20020703	20091130	DESIGN (RECTANGULAR WITH TWO BLANK SPACES)	FOX RACING, INC.	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0200454	20020705	20080908	DESIGN (FOX HEAD)	FOX RACING, INC.	N
TMK0200455	20020705	20090323	DESIGN (FOX HEAD)	FOX RACING, INC.	N
TMK0200456	20020705	20081006	DESIGN (FOX HEAD)	FOX RACING, INC.	N
TMK0200457	20020705	20080929	DESIGN (FOX HEAD)	FOX RACING, INC.	N
TMK0200458	20020705	20090316	FOX (AND DESIGN)	FOX RACING, INC.	N
TMK0200459	20020705	20080915	FOX (AND DESIGN)	FOX RACING, INC.	N
TMK0200460	20020705	20080929	FOX (AND DESIGN)	FOX RACING, INC.	N
TMK0200461	20020705	20080811	FOX (AND DESIGN)	FOX RACING, INC.	N
TMK0200462	20020708	20201219	GRAND PRIX CLASSICS	EXOTO, INC.	N
TMK0200463	20020708	20110109	1ST HEAT CAN AM COLLECTION	EXOTO, INC.	N
TMK0200464	20020708	20120108	MOTORBOX	EXOTO, INC.	N
TMK0200465	20020708	20111023	EXOTO	EXOTO, INC.	N
TMK0200466	20020708	20120101	DESIGN	EXOTO, INC.	N
TMK0200467	20020708	20100725	THUNDER TRAC	EXOTO, INC.	N
TMK0200468	20020708	20100801	EXOTO	EXOTO, INC.	N
TMK0200469	20020708	20200725	RACING LEGENDS 1	EXOTO, INC.	N
TMK0200470	20020702	20070325	SMIRNOFF (BORDERED)	GUINNESS UDV NORTH AMERICA, INC.	N
TMK0200471	20020708	20060313	PIERRE SMIRNOFF	GUINNESS UDV NORTH AMERICA, INC.	N
TMK0200472	20020708	20090809	SMIRNOFF	GUINNESS UDV NORTH AMERICA, INC.	N
TMK0200473	20020708	20051001	CROWN SHIELD FOR SMIRNOFF VODKA	GUINNESS UDV NORTH AMERICA, INC.	N
TMK0200474	20020709	20120204	M	MOTOROLA, INC.	N
TMK0200475	20020709	20110917	CROSSROADS	SPECIALIZED BICYCLE COMPONENTS	N
TMK0200476	20020709	20101128	SUPER SOUND (STYLIZED)	WATCH CLUB INC.	Y
TMK0200477	20020709	20110410	SUPER SOUND (STYLIZED)	WATCH CLUB INC.	Y
TMK0200478	20020709	20110707	PRO KENNEX	WORLD PRO KENNEX INC.	N
TMK0200479	20020709	20110403	SOUND WAVES (STYLIZED)	WATCH CLUB INC.	Y
TMK0200480	20020709	20110911	TECTRONIC (STYLIZED)	WATCH CLUB INC.	Y
TMK0200481	20020709	20110627	MOTOROLA	MOTOROLA, INC.	N
TMK0200482	20020709	20120107	MOTOROLA	MOTOROLA, INC.	N
TMK0200483	20020709	20120324	M MOTOROLA	MOTOROLA, INC.	N
TMK0200484	20020709	20060723	PSHENICHNAYA	CRISTALL U.S.A., INC.	N
TMK0200485	20020709	20060723	PSHENICHNAYA	CRISTALL U.S.A., INC.	N
TMK0200486	20020710	20110929	LONDON FOG TOWER DESIGN	LONDON FOG INDUSTRIES INC.	Y
TMK0200487	20020711	20090411	FLOWER FAIRIES	FREDERICK WARE & LIMITED	N
TMK0200488	20020711	20040913	FLOWER FAIRIES	FREDERICK WARE & LIMITED	N
TMK0200489	20020711	20090511	FLOWER FAIRIES	FREDERICK WARE & LIMITED	N
TMK0200490	20020711	20110925	FLOWER FAIRIES	FREDERICK WARE & LIMITED	N
TMK0200491	20020711	20110702	FLOWER FAIRIES	FREDERICK WARE & LIMITED	N
TMK0200492	20020710	20060907	ROMEO Y JULIETA	MAX ROHR, INC.	Y
TMK0200493	20020710	20100711	BODY BY VICTORIA	VICTORIA'S SECRET STORES INC.	N
TMK0200494	20020710	20101226	DREAM ANGELS BY VICTORIA'S SECRET	V SECRET CATALOGUE INC.	N
TMK0200495	20020710	20091126	C H CO	COOPER INDUSTRIES, INC.	N
TMK0200496	20020710	20030406	AGATHA	AGATHA BROWN	N
TMK0200497	20020710	20040913	AGATHA	AGATHA BROWN	N
TMK0200498	20020710	20100606	AGATHA	AGATHA BROWN	N
TMK0200499	20020710	20110619	AGATHA	AGATHA BROWN	N
TMK0200500	20020710	20110904	NATURE'S PRESERVES	BATH & BODY WORKS INC.	N
TMK0200501	20020710	20111120	SUPER-MAX	SUPERMAX INTERNAT'L PRIVATE LTD.	N
TMK0200502	20020710	20101128	SUPER-MAX 3	SUPERMAX INTERNATIONAL PRIVATE	N

08/01/2002 U.S. CUSTOMS SERVICE PAGE 3
07:41:30 IPR RECORDATIONS ADDED IN JULY 2002 DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0200503	20020710	20100625	THE LEADING EDGE	SUPER-MAX CORPORATION	N
TMK0200504	20020710	20100710	LASER II	MALHOTRA SHAVING PRODUCTS LTD.	N
TMK0200505	20020710	20100201	NATIONAL SPINNING CO., INC. AND DESIGN	NATIONAL SPINNING CO., INC.	N
TMK0200506	20020710	20061218	VISE GRIP (& CLASPED HAND DESIGN)	PETERSEN MANUFACTURING CO., INC.	N
TMK0200507	20020710	20030130	VISE-GRIP	PETERSEN MANUFACTURING CO., INC.	N
TMK0200508	20020710	20031106	UNIBIT	UNIBIT CORPORATION	N
TMK0200509	20020710	20100919	PROSNIP	AMERICAN TOOL COMPANIES, INC.	N
TMK0200510	20020710	20100925	STRAIT-LINE	AMERICAN TOOLS COMPANIES, INC.	N
TMK0200511	20020710	20100925	STRAIT-LINE	AMERICAN TOOLS COMPANIES, INC.	N
TMK0200512	20020712	20110626	ANN KRISTAL	OLEM SHOE CORPORATION	N
TMK0200513	20020712	20110513	BARTOLINI	OLEM SHOE CORPORATION	N
TMK0200514	20020712	20090601	BRUNO VALENTI	OLEM SHOE CORPORATION	N
TMK0200515	20020715	20120320	EFFERDENT	WARNER-LAMBERT COMPANY	N
TMK0200516	20020718	20040927	JACK NICKLAUS	GOLDEN BEAR INTERNATIONAL	N
TMK0200517	20020718	20110619	NICKELS	INTERSHOE, INC.	N
TMK0200518	20020718	20120101	SWIFTSTOR	SWIFT COMPUTER INC.	N
TMK0200519	20020718	20110714	BUSCH	PFINGST & COMPANY INC.	Y
TMK0200520	20020718	20091010	CALIFORNIA TALK AND DESIGN	EVY OF CALIFORNIA INC.	N
TMK0200521	20020719	20090810	NICKELS SOFT	INTERSHOE INC.	N
TMK0200522	20020719	20060304	HUGS	HERSHEY CHO. & CONF. CORP.	N
TMK0200523	20020719	20031005	HUGS 'N KISSES	HERSHEY CHO. & CONF. CORP.	N
TMK0200524	20020719	20100222	HUGS & KISSES	HERSHEY CHO. & CONF. CORP.	N
TMK0200525	20020719	20110515	HARRY POTTER	TIME WARNER ENTERTAINMENT CO.	N
TMK0200526	20020719	20110710	GOLDEN FLOWER AND DESIGN	PROSPERITY RESOURCES INTERNATION	N
TMK0200527	20020719	20110605	HARRY POTTER (STYLIZED)	TIME WARNER ENTERTAINMENT CO.	N
TMK0200528	20020719	20110925	HARRY POTTER	TIME WARNER ENTERTAINMENT CO.	N
TMK0200529	20020719	20111009	HARRY POTTER	TIME WARNER ENTERTAINMENT CO.	N
TMK0200530	20020719	20110515	HARRY POTTER	TIME WARNER ENTERTAINMENT CO.	N
TMK0200531	20020719	20110821	HARRY POTTER	TIME WARNER ENTERTAINMENT CO.	N
TMK0200532	20020719	20111106	SUNNYVILLE	SUNNYVILLE PRODUCTS INC.	N
TMK0200533	20020719	20060813	MAGIC	JACOBSON PRODUCTS COMPANY INC.	N
TMK0200534	20020719	20120129	SWORDSTORE.COM NOSYUIAIDO CUSTOM CRAFTED JAPANESE SWORD	POLLAND, RICK	N
TMK0200535	20020719	20101017	PENDLETON ORIGINALS BORN IN OREGON	PENDLETON WOOLEN MILLS INC.	N
TMK0200536	20020719	20070506	PENDLETON AND DESIGN N	PENDLETON WOOLEN MILLS INC.	N
TMK0200537	20020719	20050312	SWAROVSKI OPTIK LOGO	SWAROVSKI OPTIK NORTH AMERICA	N
TMK0200538	20020719	20120115	DEVIL DUCKIE	MARK L. PAHLOW,DBA ACCOUNTREMENT	N
TMK0200539	20020719	20091116	OAKLEY	OAKLEY INC.	N
TMK0200540	20020719	20101121	MOTION SYSTEMS	MOTION SYSTEMS CORPORATION	N
TMK0200541	20020719	20100418	MOTION	MOTION SYSTEMS CORPORATION	N
TMK0200542	20020719	20050117	MOTION AND DESIGN	MOTION SYSTEMS CORPORATION	N
TMK0200543	20020719	20101107	POST IT AND DESIGN	MINNESOTA MINING & MANUFACTURING	N
TMK0200544	20020719	20060817	POST-IT	MINNESOTA MINING & MANUFACTURING	N
TMK0200545	20020719	20101107	POST-IT AND DESIGN	MINNESOTA MINING & MANUFACTURING	N
TMK0200546	20020723	20110710	EPOS	DORNIER MEDICAL SYSTEMS INC.	N
TMK0200547	20020723	20120407	SJ ST. JOHN BOUTIQUES	ST. JOHN KNITS, INC.	N
TMK0200548	20020726	20021117	SKWISH	MANHATTEN GROUP, LLC	N
TMK0200549	20020726	20110821	SECURE CARE MATCHMAKER I.D. (PLUS DESIGN)	SECURE CARE PRODUCTS, INC.	N
TMK0200550	20020729	20021113	PEDESTRIAN SHOES AND DESIGN	PEDESTRIAN CORPORATION	N
TMK0200551	20020730	20070415	PENDLETON AND DESIGN	PENDLETON WOOLEN MILLS INC.	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0200552	20020730	20110820	PARADISE (PLUS DESIGN)	YELIN ENTERPRISE CO., LTD.	N
TMK0200553	20020731	20110818	PINNACLE	ACUSHNET COMPANY	N
TMK0200554	20020731	20111211	DESIGN (POLKA DOT GOLF CLUB)	ACUSHNET COMPANY	N
TMK0200555	20020731	20111211	DESIGN (OCTAGONAL GOLF CLUB)	ACUSHNET COMPANY	N

SUBTOTAL RECORDATION TYPE 116

TOTAL RECORDATIONS ADDED THIS MONTH 148

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, August 21, 2002.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,
(for Michael T. Schmitz, Assistant Commissioner,
Office of Regulations and Rulings.)

MODIFICATION OF RULING LETTER AND TREATMENT RELATING TO THE CLASSIFICATION AND PREFERENTIAL TREATMENT OF DOWNHILL SKI POLES ASSEMBLED IN CANADA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of ruling letter and treatment relating to the classification and preferential treatment of downhill ski poles assembled in Canada.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter pertaining to the tariff classification and preferential treatment of ski poles assembled in Canada under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of the proposed action was published on July 10, 2002, in Volume 36, Number 28, of the CUSTOMS BULLETIN. No comments were received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 4, 2002.

FOR FURTHER INFORMATION CONTACT: T. James Min II, Special Classification and Marking Branch, (202) 572–8839.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on July 10, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 28, proposing to modify Headquarters Ruling Letter (HRL) 546534, dated August 21, 1998, pertaining to the classification and preferential treatment of ski poles assembled in Canada under the Harmonized Tariff Schedule of the United States (HTSUS). No comments were received in reply to the notice.

In Headquarters Ruling Letter (HRL) 546534, dated August 21, 1998, Customs ruled on whether downhill ski poles assembled in Canada from components of ski poles imported from Italy were eligible for NAFTA preferential treatment. The process for producing the finished poles in Canada in HRL 546534 was essentially as follows: raw tapered tubes were sized and cleaned, then placed on a silk screening machine which affixed a graphic or logo onto the pole. Following this, the poles were subjected to a baking process for approximately fifteen minutes. The poles were cleaned again, then underwent another round of silk screening. Depending on customer orders, the poles may have been subjected to as many as five silk screenings before this process was completed.

Polyethylene grips were assembled with straps and screws. Fabric was cut to length and folded to form a loop, then a screw was attached to form a strap. The strap was then placed on top of the grip and another screw was attached to hold the strap in place. Once the tube and grip were ready, they were placed on another machine where the grip was mounted on the top of the pole, and an insert to hold the basket was placed on the bottom. The finished pole was then cleaned a final time. The poles were packaged in pairs along with plastic baskets and packaged in vacuum sealed bags. Finally, the poles were boxed according to customer orders and shipped to various destination in the U.S. and Canada.

In HRL 546534, Customs found that the tube component of the ski pole imported into Canada from Italy was classified as a part of a ski pole for which the tariff heading is the same as the ski pole itself. Although this non-originating material did not undergo a change in tariff classification as required by General Note ("GN") 12(b)(ii), pursuant to GN 12(b)(iv)(B), which provides an exception to the tariff shift rule for parts classifiable in the same heading as the goods themselves, the ski pole still qualified for NAFTA preference, provided that the regional value-content requirement stipulated in GN 12(b)(iv) was met.

In the course of ruling on HRL 546534, Customs initiated an audit to determine whether the value content of the finished ski poles met the requirements of NAFTA preference, as specified in GN 12(b)(iv). The audit showed that the regional value-content had been met.

Customs has reconsidered the basis for the determination in HRL 546534 that the ski poles were entitled NAFTA preferential treatment and determined that it is incorrect. It is now Customs position that the ski pole components as imported into Canada were classifiable as the finished good entered unassembled pursuant to General Rules of Interpretation (GRI) 2(a). Therefore, although the determination in HRL 546534 that the ski poles were eligible for NAFTA preference is still valid, the basis under which the ski poles qualify for the preference is modified. Because the ski pole components imported into Canada from Italy are classifiable as an unassembled good, they are eligible for NAFTA preference subject to GN12(b)(iv)(A) and not GN 12(b)(iv)(B).

Pursuant to 19 U.S.C. 1625(c)(1), Customs is modifying HRL 546534 and any other rulings not specifically identified to reflect the proper basis for qualifying the articles for NAFTA preferential treatment pursuant to the analysis set forth in HRL 562427 (*see* "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is modifying any treatment previously accorded by Customs to substantially identical transactions.

As stated in the proposal notice, this modification will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject of this notice, should have advised the Customs Service during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is modifying any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importation of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any persons involved in substantially identical transactions should have advised Customs during the notice period. An importer's failure to advise the Customs Service of substan-

tially identical transaction or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of this notice.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: August 19, 2002.

CRAIG WALKER,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 19, 2002.

CLA–2 RR:CR:SM 562427 TJM
Category: Classification
Tariff No. 9506.19.8040

PORT DIRECTOR
U.S. CUSTOMS SERVICE
111 West Huron Street
Buffalo NY 14202–2378

Re: HRL 546534; Modification of Ruling; 19 USC 1625; NAFTA Rules of Origin; ski poles; parts; unassembled good; tariff shift exceptions; 19 CFR Part 181 Appendix; NAFTA ROR §4(4)(a); NAFTA ROR § 4(4)(b); Gabel Enterprises, Inc.; GN 12(b)(iv)(B), HTSUS; GN 12(b)(iv)(A), HTSUS; GRI 2(a).

DEAR DIRECTOR:

This letter is to inform you that Customs has reconsidered Headquarters Ruling Letter ("HRL") 546534, dated August 21, 1998, addressed to you regarding an application for further review of protest number 0901–96–100816 filed by G.M. Gabel Enterprises Windsor, Inc., ("Gable") through its brokers.

The protest concerned the North American Free Trade Agreement (NAFTA) preference eligibility of downhill ski poles assembled in Canada from components imported from Italy. After review of that ruling, we have determined that although the ruling's conclusion that the affected articles were entitled to NAFTA preference remains valid, the stated basis for that conclusion is incorrect. In HRL 546534, the Italian aluminum tube component was considered a ski pole part in the same provision as the finished ski pole. After consideration, it is now our opinion that the components imported into Canada are classifiable as an unassembled ski pole. Therefore, the proper basis for determining that the articles are entitled to NAFTA preference is General Note ("GN") 12(b)(iv)(A) and not GN 12(b)(iv)(B) (or 19 CFR Part 181, App. § 4(4)(a) as opposed to (b)). For the reasons that follow, this ruling modifies HRL 546534.

Facts:

G.M. Gabel Enterprises Windsor Inc. ("Gabel") is a member of the Gabel Group which, in addition to Gabel, includes Gabel s.r.l. (Italy), Gabel Deutschland and Gabel Enterprises Zlin (Czech Republic). Gabel purchases and imports aluminum tubes, polyethylene grips, polyethylene inserts, rolls of polyester fabric, polyethylene baskets and silk screening ink from Gabel s.r.l. At its plant in Tecumseh, Ontario, Gabel uses the imported mate-

rials, together with certain originating materials such as packaging, shrink rap, glue, patterns and screws, to produce finished ski poles per customer orders.

The process for producing finished poles is essentially as follows. Raw tapered tubes are sized and cleaned, then placed on a silk screening machine which affixes a graphic or logo onto the pole. Following this, the poles are subjected to a baking process for approximately fifteen minutes. The poles are cleaned again, then undergo another round of silk screening. Depending on customer orders, the poles may be subjected to as many as five silk screenings before this process is completed.

Polyethylene grips are assembled with straps and screws. Fabric is cut to length and folded to form a loop, then a screw is attached to form a strap. The strap is then placed on top of the grip and another screw is attached to hold the strap in place. Once the tube and grip are ready they are placed on another machine where the grip is mounted on the top of the pole, and an insert to hold the basket is placed on the bottom. The finished pole is then cleaned a final time. The poles are packaged in pairs along with plastic baskets and packaged in vacuum sealed bags. Finally, the poles are boxed according to customer orders and shipped to various destinations in the U.S. and Canada.

The facts in HRL 546534 show that Gabel initially submitted a certificate of origin claiming that the poles imported into the U.S. were entitled to preferential treatment under the NAFTA on the grounds that the poles satisfied the specific rule of origin applicable to their tariff classification (preference criterion B). The claim for NAFTA preference was based on the entered classifications of the imported materials which were as follows: aluminum tubing, subheading 7608.20.9000, Harmonized Tariff Schedule of the United States (HTSUS); polyethylene grips; subheading 3926.90.9000, HTSUS; polyester material, subheading 3920.69.0010, HTSUS; polyethylene inserts, subheading 3926.90.9019, HTSUS; polyethylene baskets, subheading 3926.90.9099, HTSUS; and silk screening ink, subheading 3215.90.0090, HTSUS. Since the finished ski poles are classified in subheading 9506.19.8040, HTSUS, the basis of the claim was that all the non-originating materials used in the production of the poles underwent a change in tariff classification in accordance with the applicable rule of origin in GN 12(t).

The claim for NAFTA preference was denied by your office pursuant to a CF 29 dated April 27, 1995. In particular, you determined that the imported materials did not undergo the change in tariff classification required under the applicable rule of origin. For example, your office determined that the imported aluminum tubes are properly classified under the provision for other snow-skis and other snow-ski equipment, and parts and accessories thereof, in subheading 9506.19.8040, HTSUS. Consequently, all the non-originating materials used in the production of the poles did not undergo the required change in tariff classification.

Gabel then submitted additional information and, in an amended certificate of origin, claimed that the poles originated pursuant to preference criterion D2, viz., that the poles did not undergo a change in tariff classification because the relevant heading provided for both the good and its parts, but that they had a regional value content of not less than sixty percent under the transaction value method. After reviewing the additional information, this claim was also denied by your office on the basis that the information submitted was insufficient to establish eligibility for NAFTA preference.

The relevant entries were liquidated accordingly (on December 29, 1995 and January 5, 1996) at the higher, non-preferential rate of duty, and Gabel was so advised in a CF 29 dated February 2, 1996. The importer of record filed a protest on March 28, 1996, contending that the imported ski poles are originating goods under the NAFTA on the basis that they satisfy the requirement of a regional value content of not less than fifty percent under the net cost method. Additional information, including Gabel's 1994 financial statements, was provided by Gabel in support of the protest. Further information was submitted under cover of letters dated January 29, 1997, June 19, 1997, and November 6, 1997. The information submitted by Gabel included calculations which showed a regional value content under the net cost method of well in excess of fifty percent.

After reviewing that information, however, this office requested that an origin verification be undertaken pursuant to section 181.71, Customs Regulations (19 C.F.R. §181.71). Accordingly, the Regulatory Audit Division, Boston, conducted a verification of Gabel's NAFTA claim at Gabel's offices in Tecumseh, Ontario. A member of this office participated in and assisted with the verification. The objective of the verification was to verify that Gabel's books and records supported its claim that the regional value of the imported ski poles was not less than fifty percent under the net cost method.

In HRL 546534, Customs reasoned that subject to Section 4(4)(b)(ii) of the Appendix to Part 181, Customs Regulations (19 CFR Part 181, App.), NAFTA Rules of Origin Regulations ("ROR"), the only remaining question was whether the regional value content of the good is not less than 60 percent where the transaction value method is used, or is not less than 50 percent where the net cost method is used. Customs determined that the regional value content of the ski poles was not less than 50 percent when using the net cost method, subject to NAFTA ROR § 4(4)(b) rather than § 4(4)(a).

Issue:

Whether the merchandise described above qualifies for NAFTA preferential treatment under the NAFTA rules of origin exceptions for parts or for unassembled goods.

Law and Analysis:

I. Classification of Ski Pole Components

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be utilized. EN, though not dispositive or legally binding, provide commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. Customs believes the EN should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The term "ski pole," found under subheading 9506.19.8040, HTSUS, which provides for other sports equipment, ski poles and parts and accessories thereof, is not defined in the HTSUS or in the ENs. *Merriam-Webster's Collegiate Dictionary, 10th Ed.*, defines "ski poles" as, "one of a pair of lightweight poles used in skiing that have a handgrip and usu. a wrist strap at one end and an encircling disk set above the point at the other."

The issue before us is whether the ski pole components imported into Canada from Italy are considered parts of ski poles or if they are, as described in GRI 2(a), considered an unfinished article entered unassembled. GRI 2(a), provides that:

> Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished * * *, **entered unassembled or disassembled.** (Emphasis added)

Although the aluminum tube component of the ski pole, which (as imported into Canada) is tapered at the bottom with a tip permanently affixed, comprises the essential character of the ski pole, the other major parts of the ski pole (e.g. basket, grip, strap) are also imported from Italy and are assembled together with the tube in Canada to create the finished article. Our records for HRL 546534 include invoices and airway bills for the importation of Italian ski pole components into Canada. These records show that the ski pole components were imported together.

Therefore, the components of the ski pole imported into Canada from Italy are, pursuant to GRI 2(a), classifiable as a ski pole in subheading 9506.19.8040, HTSUS, entered unassembled.

II. NAFTA Preferential Treatment

For determining eligibility of goods for NAFTA preferential treatment, General Note (GN) 12(a), HTSUS, (19 U.S.C. § 1202), states that:

* * * * * * *

> Goods originating in the territory of a party to the North American Free Trade Agreement (NAFTA) are subject to duty as provided herein. For the purposes of this note—
>
> (i) Goods that originate in the territory of a NAFTA party under the terms of subdivision (b) of this note and that qualify to be marked as goods of Canada under the terms of the marking rules * * * are eligible for such duty rate, in accordance with section 201 of the North American Free Agreement Implementation Act.

* * * * * * *

GN 12(b) further provides a hierarchy of rules to determine whether goods are "originating" in the territory of a NAFTA party. It states, in pertinent part, that:

* * * * * * *

> (b) For purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as "goods originating in the territory of a NAFTA party" only if—
>
> (i) they are goods wholly obtained or produced entirely in the territory of Canada, Mexico and/or the United State; or
>
> (ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that—
>
> (A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivision (r), (s) and (t) of this note or the rules set forth therein, or
>
> (B) the goods otherwise satisfy the applicable requirements of subdivision (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note; or
>
> (iii) they are goods produced entirely in the territory of Canada, Mexico and/or the United States exclusively from originating materials; or. * * *

* * * * * * *

Noting that the major components of ski poles are imported from Italy, GN 12(b)(i) and 12(b)(iii) are not applicable in the instant case. As for GN 12(b)(ii), because the ski poles are classifiable in subheading 9506.19.8040, HTSUS, the non-originating materials must undergo a change in tariff classification as stipulated in GN 12(t)/95.50: "[a] change to subheadings 9506.11 through 9506.29 from any other chapter." Because the non-originating components in the instant case are in the same chapter heading as the finished article, the non-originating components do not undergo a change in tariff classification as required by GN 12(b)(ii).

A. Exceptions to the Tariff Shift Rule

However, GN 12(b)(iv) provides two exceptions to the tariff shift rule. GN 12(b)(iv) provides that a good may still qualify as originating in a NAFTA country if:

* * * * * * *

> (iv) they are produced entirely in the territory of Canada, Mexico and/or the United States but one or more of the non-originating materials falling under provisions for "parts" and used in the production of such goods does not undergo a change in tariff classification because—
>
> (A) the goods were imported into the territory of Canada, Mexico and/or the United States in unassembled or disassembled form but were classified as assembled goods pursuant to general rule of interpretation 2(a), or
>
> (B) the tariff headings for such goods provide for and specifically describe both the goods themselves and their parts and is not further divided in subheadings, or the subheadings for such goods provide for and specifically describe both the goods themselves and their parts,
>
> provided that such goods do not fall under chapters 61 through 63, inclusive, of the tariff schedule, and provided further that the regional value content of such goods, determined in accordance with subdivision (c) of this note, is not less than 60 percent where the transaction value method is used, or is not less than 50 percent where the net cost method is used, and such goods satisfy all other applicable provisions of this note. * * *

* * * * * * *

Noting that the major components of ski poles as imported into Canada from Italy are classifiable as an unassembled ski pole pursuant to GRI 2(a), the finished ski poles qualify as NAFTA originating based on HRL 546534's determination that the value-content requirements of GN 12(b)(iv) had been met.

B. NAFTA Rules of Origin for Marking Purposes

Furthermore, pursuant to GN 12(a), to qualify for the NAFTA preferential duty rate, the good must also qualify to be marked as a good of Canada. The NAFTA rules of origin

for marking purposes are set forth in section 102.11, Customs Regulations (19 CFR § 102.11), which provide a hierarchy of rules as follows:

* * * * * * *

The following rules shall apply for purposes of determining the country of origin of imported goods other than textile and apparel products covered by § 102.21.

(a) The country of origin of a good is the country in which:

(1) The good is wholly obtained or produced;

(2) The good is produced exclusively from domestic materials; or

(3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in § 102.20 and satisfies any other applicable requirements of that section, and all other applicable requirements of these rules are satisfied.

* * * * * * *

For products classifiable in heading 9506.19, HTSUS, 19 C.F.R. §102.20, Section XX: Chapters 94 through 96, 9504.10–9506.29 states the requirement of a change in tariff classification for non-originating materials: "A change to subheading 9504.10 through 9506.29 from any other subheading, including another subheading within that group." In the instant case, because the non-originating unassembled ski pole components are classifiable in the same subheading as the assembled ski pole, a change in tariff classification requirement for marking purposes is not satisfied.

However, section 102.19, Customs Regulations, (19 CFR §102.19), provides a NAFTA preference override. It states, in pertinent part, that:

* * * * * * *

(a) Except in the case of goods covered by paragraph (b) of this section, if a good which is originating within the meaning of § 181.1(q) of this chapter is not determined under § 102.11(a) or (b) or § 102.21 to be a good of a single NAFTA country, the country of origin of such good is the last NAFTA country in which that good underwent production other than minor processing, provided that a Certificate of Origin * * * has been completed and signed for the good.

* * * * * * *

As the ski poles qualify as NAFTA originating for reasons discussed above and the processing in Canada is more than minor processing (*see* 19 CFR § 102.1(m)), the ski poles qualify as products of Canada for marking purposes under 19 C.F.R. § 102.19(a).

Holding:

For the foregoing reasons, the ski poles at issue in HRL 546534 qualify for NAFTA preference. However, the proper basis of eligibility for NAFTA preference GN 12(b)(iv)(A), rather than GN 12(b)(iv)(B).

Effect on Other Rulings:

HRL 546534, dated August 21, 1998, is hereby modified. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

CRAIG WALKER,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A BEVERAGE SWEETENER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter and treatment relating to the classification of a beverage sweetener.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling concerning the tariff classification of a beverage sweetener, under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed actions.

DATE: Comments must be received on or before October 4, 2002.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulation and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at 799 9th St. N.W. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Allyson Mattanah, General Classification Branch, (202) 572–8784.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as

amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of a beverage sweetener. Although in this notice Customs is specifically referring to New York Ruling Letter (NY) A80165, dated March 6, 1996, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. This notice will cover any rulings on this merchandise that may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

In NY A80165, Customs ruled that a beverage sweetener was classified in subheading 2106.90.12, HTSUS, the provision for "Food preparations not elsewhere specified or included: Compound alcoholic preparations of an alcoholic strength by volume exceeding 0.5 percent vol., of a kind used for the manufacture of beverages: Containing not over 20 percent of alcohol by weight." NY A80165 is set forth as Attachment "A" to this document.

It is now Customs position that this substance was not correctly classified in NY A80165 because it is not a "substantially complete" beverage in itself that need only be diluted and further flavored. Rather, it contains only three ingredients. It is used only to impart sweetness to

the finished beverage. Being mainly sugar, the merchandise is classified in subheading 2106.90.94, 95, 97 or 99, HTSUS, by its sugar content.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke NY A80165 and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter (HQ) 965509. (*see* Attachment "B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: August 19, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, March 6, 1996.

CLA–2–21:RR:NC:FC:228 A80165
Category: Classification
Tariff No. 2106.90.1200

JOHN B. PELLEGRINI
ROSS & HARDIES
65 East 55th Street
New York, NY 10022

Re: The tariff classification and status under the North American Free Trade Agreement (NAFTA), of beverage sweetener from Canada; Article 509.

DEAR MR. PELLEGRINI:

In your letter dated February 2, 1996 on behalf of Joseph E. Seagram & Sons, Inc., you requested a ruling on the status of beverage sweetener from Canada under the NAFTA.

The product is a beverage sweetener consisting of water, alcohol, (11.5 percent by volume), and a sugar additive (one or more of invert sugar syrup, liquid sugar, liquid fructose, high fructose corn syrup, sugar water solution, or fructose water solution). The water and alcohol may be a product of the United States or Canada. The sugar additive may be either a product of the United States, Canada, or another, unspecified, country. The beverage sweetener will be used in the manufacture of distilled spirits, wine specialty products, malt specialty products and flavorings.

The applicable tariff provision for the beverage sweetener will be 2106.90.1200, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for compound alcoholic preparations of an alcoholic strength by volume exceeding 0.5 percent vol., of a kind used for the manufacture of beverages * * * containing not over 20 percent of alcohol by weight. The general rate of duty will be 5.8 cents per kilogram plus 2.6 percent ad valorem. The sweetener is also subject to a Federal Excise Tax of $13.50 per proof gallon and a proportionate tax at the like rate on all fractional parts of a proof gallon.

Each of the non-originating materials used to make the sweetener has satisfied the changes in tariff classification required under HTSUSA General Note 12(t)/21. The bever-

age sweetener will be entitled to a free rate of duty under the NAFTA upon compliance with all applicable laws, regulations, and agreements. The sweetener is also subject to a Federal Excise Tax of $13.50 per proof gallon and a proportionate tax at the like rate on all fractional parts of a proof gallon.

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Stanley Hopard at 212–466–5760.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 965509 AM
Category: Classification
Tariff No. 2106.90.94, 95, 97 or 99

MR. JOHN PELLEGRINI
ROSS & HARDIES
65 East 55th Street
New York, NY 10022–3219

Re: NY A80165 revoked; beverage sweetener.

DEAR MR. PELLEGRINI:

This is in reference to New York Ruling Letter (NY) A80165 issued to you on March 6, 1996, by the Director, Customs National Commodity Specialist Division, concerning the classification, under the Harmonized Tariff Schedule of the United States, (HTSUS), of a beverage sweetener. We have had an opportunity to review this ruling and believe it is incorrect.

Facts:

NY A80165 states that the beverage sweetener consists of "water, alcohol, (11.5 percent by volume), and a sugar additive (one or more of invert sugar syrup, liquid sugar, liquid fructose, high fructose corn syrup, sugar water solution, or fructose water solution)." The merchandise was classified in subheading 2106.90.12, the provision for Compound alcoholic preparations of an alcoholic strength by volume exceeding 0.5 percent vol., of a kind used for the manufacture of beverages: Containing not over 20 percent of alcohol by weight.

Issue:

Is a beverage sweeter, consisting of water, sugar and alcohol classifiable in subheading 2106.90.12, HTSUS, the provision for "[F]ood preparations not elsewhere specified or included: [O]ther: [C]ompound alcoholic preparations of an alcoholic strength by volume exceeding 0.5 percent vol., of a kind used for the manufacture of beverages: Containing not over 20 percent of alcohol by weight."

Law and Analysis:

Merchandise imported into the U.S. is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context that requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise

required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs.

In interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUSA. See T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The competing provisions occur at the eighth digit. The following sub-headings are relevant to the classification of this product:

2106	Food preparations not elsewhere specified or included:
2106.90	Other
2106.90.12	Compound alcoholic preparations of an alcoholic strength by volume exceeding 0.5 percent vol., of a kind used for the manufacture of beverages: Containing not over 20 percent of alcohol by weight.
* * *	* * * * *
	Other
	Other
	Other
	Other
	Articles containing over 65 percent by dry weight of sugar described in additional U.S. note 2 to chapter 17:
2106.90.94	Other
	Articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17:
2106.90.95	Described in additional U.S. note 8 to chapter 17 and entered pursuant to its provisions
2106.90.97	Other
2106.90.99	Other

EN 21.06 states, in pertinent part, the following:

> The heading includes, *inter alia:*
>
> (7) Non-alcoholic or alcoholic preparations (not based on odoriferous substances) of a kind used in the manufacture of various non-alcoholic or alcoholic beverages. These preparations can be obtained by compounding vegetable extracts of heading 13.02 with lactic acid, tartaric acid, citric acid, phosphoric acid, preserving agents, foaming agents, fruit juices, etc. The preparations contain (in whole or in part) the flavouring ingredients which characterize a particular beverage. As a result, the beverage in question can usually be obtained simply by diluting the preparation with water, wine or alcohol, with or without the addition, for example, of sugar or carbon dioxide gas. Some of these products are specially prepared for domestic use; they are also widely used in industry in order to avoid the unnecessary transport of large quantities of water, alcohol, etc. As presented, these preparations are not intended for consumption as beverages and thus can be distinguished from the beverages of Chapter 22.

Subheadings 2106.90.12, 15, and 18, HTSUS, were created in 1996, when, as part of amendments to the tariff schedule, heading 2208, HTSUS, was modified, removing compound alcoholic preparation from its purview. The text to EN 21.06 (7), *supra*, is virtually identical to the EN to heading 2208 prior to the amendments. As such, administrative rulings related to the previous heading 2208, HTSUS, which construe the phrase "compound alcoholic preparations," are instructive.

For instance, in HQ 955265, dated February 9, 1994, we held that a citric acid additive was not classified in heading 2208, HTSUS. The product contained 89 percent ethyl alcohol, 10 percent citric acid, and water and was blended with a wine or malt base, water, sugar, preservatives, flavorings, colorings and a carbonating agent after entry to produce a wine cooler. The citric acid additive comprised only 1.5 to 2.5 percent of the finished product. We stated in that ruling that "the citric acid additive, rather than being a complex preparation, is essentially an alcohol flavored with the acid used to impart a tang to a wine or malt base, which is processed further to produce the cooler; it only accounts for, at most, 2.5 percent of the finished product. Thus, the additive would not be a complex preparation of a type classifiable in heading 2208."

By contrast, HQ 953327, dated June 4, 1993, held that a non-fat dairy base rum liqueur was classified in heading 2208, HTSUS. The product consisted of milk protein concentrate, skim milk concentrate, sucrose, water, rum and maltodextrins. After entry it was mixed with additional distilled spirits, sugar, flavors and color. We stated that "the beverage is substantially complete as imported; the ingredients added subsequent to importation do not change the basic composition of the imported product, which is that of an almost completed alcoholic beverage, but merely enhance it."

Following this reasoning, NY H82685, dated August 1, 2001, classified a Natural Tequila/Agave flavoring containing agave spirits, alcohol, agave wine, natural orange flavor, tequila, anhydrous citric acid and water in subheading 2106.90.15, HTSUS, as a compound alcoholic preparation. The contents of the merchandise appear substantially complete albeit not suitable as a beverage in themselves.

Likewise, in NY C87981, dated May 29, 1998, we classified concentrated fermented apple cider and pear cider as compound alcoholic preparations because they need only be diluted, sweetened and carbonated to transform into the final products, apple and pear ciders. They, too, are substantially complete.

Like the citric acid additive of HQ 955265, a mixture of three ingredients added to impart a tang to the finished beverage, the instant merchandise also contains just three ingredients added to impart a sweetness to the finished beverage. Unlike the non-fat dairy base rum liqueur, tequila/agave flavoring and apple and pear ciders, the instant merchandise is not a "substantially complete" beverage in itself that need only be diluted and further flavored. Therefore, we do not believe the instant mixture falls within the scope of the terms "compound alcoholic preparations of a kind used for the manufacture of beverages." Rather, the instant merchandise, being mainly sugar, is classified as an "other food preparation" in subheading 2106.90.94, 97 or 99, HTSUS, by its sugar content. The appropriate quota provisions may apply.

Holding:

The beverage sweetener is classified in subheading 2106.90.94, 95, 97 or 99, HTSUS, by its sugar content. Should the importer desire a binding ruling on the beverage sweetener, a ruling request containing all necessary information should be submitted to the Director, National Commodity Specialist Division, U.S. Customs, Attn: CIE/Ruling Request, One Penn Plaza, 10th Floor, New York, NY 10119.

Effect on Other Rulings:

NY A80165 is revoked.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF GLOVES

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed revocation of a tariff classification ruling letter and treatment relating to the classification of gloves.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke one ruling relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain gloves. Similarly, Customs proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before October 4, 2002.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs Service, 799 9th Street, N.W., Washington D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Timothy Dodd, Textiles Branch: (202) 572–8819.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for us-

ing reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke one ruling relating to the tariff classification of a certain pair of gloves. Although in this notice Customs is specifically referring to one New York Ruling Letter (NY), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, a ruling letter, an internal advice memorandum or decision or a protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importers or their agents for importations of merchandise subsequent to this notice.

In New York Ruling Letter (NY) F80802, dated January 11, 2000, the Customs Service classified a certain pair of gloves under subheading 6216.00.4600, HTSUSA, which provides for "Gloves, mittens and mitts: Other: Of man-made fibers: Other gloves, mittens and mitts, all the foregoing specially designed for use in sports, including ski and snowmobile gloves, mittens and mitts." NY F80802 is set forth as "Attachment A" to this document.

It is now Customs determination that the proper classification for the gloves is subheading 6216.00.5820, HTSUSA, which provides for "Gloves, mittens and mitts: Other: Of man-made fibers: Other: With fourchettes, Other." Proposed Headquarters Ruling Letter (HQ) 965714 revoking NY F80802 is set forth as "Attachment B" to this document.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY F80802, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed HQ 965714, *supra*. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously ac-

corded by Customs to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: August 15, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, January 11, 2002.

CLA–2–62:RR:NC:TA:354 F80802
Category: Classification
Tariff No. 6216.00.4600

MR. EDUARD JAEGER
IRONCLAD PERFORMANCE WEAR CORPORATION
2950 31st Street, Suite 386
Santa Monica, CA 90405

Re: The tariff classification of gloves from Korea.

DEAR MR. JAEGER:

In your letter dated December 22, 1999, you requested a tariff classification ruling.

The provided sample, style IC–0200GRBBU, is a glove with a complete palmside from fingertips to wrist constructed of a synthetic leather fabric. The balance of the glove is made of mesh fabric, with the exception of the backside thumb which consists of a terry cloth sweat panel. The glove features padded synthetic leather reinforcements at the palm and the base of the palmside fingers, a reinforced thumb/forefinger crotch, "Ironclad" embossed vinyl overlays sewn on the padded backside knuckle area and palmside pull on tab, and coated knit fabric trim at the vented wrist which is secured by a hook and loop fabric closure. The cumulation of features show a design for use in the sport of competitive biking.

The applicable subheading for the glove will be 6216.00.4600, Harmonized Tariff Schedule of the United States (HTS), which provides for Gloves, mittens and mitts: other: of man-made fibers: other gloves, mittens and mitts, all the foregoing specially designed for use in sports, including ski and snowmobile gloves, mittens and mitts. The rate of duty will be 3.9 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Brian Burtnik at 212–637–7083.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 965714 ttd
Category: Classification
Tariff No. 6216.00.5820

EDUARD JAEGER
IRONCLAD PERFORMANCE WEAR CORPORATION
2950 31st Street, Suite 386
Santa Monica, CA 90405

Re: Revocation of New York Ruling Letter F80802; Gloves.

DEAR MR. JAEGER:

This letter is pursuant to Customs reconsideration of New York Ruling Letter (NY) F80802, dated January 11, 2000, filed on behalf of Ironclad Performance Wear Corporation (Ironclad), regarding classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of a pair of gloves. After review of NY F80802, Customs has determined that the classification of the gloves considered under subheading 6216.00.4600, HTSUSA, was incorrect. For the reasons that follow, this ruling revokes NY F80802.

Facts:

The article under consideration is a pair gloves, identified as style IC–0200GRBBU. In NY F80802, Customs classified the merchandise under subheading 6216.00.4600, HTSUSA, which provides for "Gloves, mittens and mitts: Other: Of man-made fibers: Other gloves, mittens and mitts, all the foregoing specially designed for use in sports, including ski and snowmobile gloves, mittens and mitts." In that ruling, the merchandise was described as:

> [A] glove with a complete palmside from fingertips to wrist constructed of a synthetic leather fabric. The balance of the glove is made of mesh fabric, with the exception of the backside thumb which consists of a terry cloth sweat panel. The glove features padded synthetic leather reinforcements at the palm and the base of the palmside fingers, a reinforced thumb/forefinger crotch, "Ironclad" embossed vinyl overlays sewn on the padded backside knuckle area and palmside pull on tab, and coated knit fabric trim at the vented wrist which is secured by a hook and loop fabric closure. The cumulation of features show [*sic*] a design for use in the sport of competitive biking.

Issue:

Whether the merchandise is specially designed for use in sports.

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes * * *." In the event that goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. While neither legally binding nor dispositive of classification issues, the EN provide commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. *See* T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989).

Subheading 6216.00.46, HTSUSA, provides for, in part, gloves, mittens and mitts, specially designed for use in sports. As this is a "use" provision, to determine whether an article is classifiable in subheading 6216.00.46, HTSUSA, requires consideration of whether the article has particular features that adapt it for the stated purpose. In *Sport Industries, Inc. v. United States*, 65 Cust. Ct. 470, C.D. 4125 (1970), the court, in interpreting the term "designed for use," under the Tariff Schedules of the United States, the predecessor to the

HTSUSA, examined not only the features of the articles, but also the materials selected and the marketing, advertising and sale of the article. The case suggests that, to be classifiable in subheading 6216.00.46, the subject gloves must be shown to be, in fact, specially designed for use in a particular sport.

Concerning the proper classification of sports gloves, numerous other court cases have examined the term "specially designed for use in sports." In *American Astral Corp. v. United States*, 62 Cust. Ct. 563, C.D. 3827 (1969), the court held that certain gloves were properly classified as lawn tennis equipment because the evidence established that the gloves were specially designed for use in the game of tennis. At the time, the Tariff Schedules of the United States included provisions for tennis equipment covering specially designed protective articles, such as gloves. The court noted the glove's distinguishing characteristics, which set it apart from ordinary gloves worn as apparel. Those features included: (a) an absorbent terry cloth back; (b) a partially perforated lambskin palm designed to aid grip, provide protection, and prevent perspiration by allowing air circulation; (c) fourchettes made from stretch material; (d) elasticized wrist for a snug fit and support; and (e) a button positioned to prevent interference to the player. Additionally, the court considered factors such as the nature of the importer's business, how the gloves were advertised in the trade, the types of stores where the gloves were sold, and the fact that the gloves were sold only in single units and not in pairs. The court also noted that, the fact that the gloves had other possible uses did not preclude their classification as sporting equipment. *See*, U.S. Customs Service, *What Every Member of the Trade Community Should Know About: Gloves, Mittens & Mitts, Not Knitted or Crocheted Under the HTSUS*, 32 Cust. B. & Dec. 51 (Dec 23, 1998).

In *Porter v. United States*, 409 F. Supp. 757; 76 Cust. Ct. 97, Cust. Dec. 4641 (1976), the court held that certain motorcross gloves, which possessed features specially designed for use in the sport of motorcross, were accordingly, specially designed for use in sports, even though not used exclusively for the sport of motorcross. In *Porter*, the court based its conclusion on the fact that motorcross gloves featured special characteristics and construction, specially designed for the sport of motorcross. These characteristics included a shortened palm, a reinforced thumb, an elastic band, protective strips or ribbing, and an out-seam construction. These features complimented the particular protective needs of the driver while racing with the specially designed motorcross bike on a dirt track. It was also shown that motorcross racing encompasses internationally accepted rules and that the American Motorcycle Association Motorcross Competition Rule Book specifically requires certain protective clothing and equipment, of which the motorcross gloves at issue were one type that complied with the requirements for the gloves. While the court noted that the gloves were subject to use outside the sport of motorcross, the plaintiff had already demonstrated that the gloves were primarily designed for the sport of motorcross. Moreover, the features, which made the gloves ideal for the sport of motorcross, rendered them useless or cumbersome for other types of motorcycle riding. Thus, the court in *Porter* found that the merchandise considered was designed to meet the needs of the sport.

Accordingly, a conclusion that a certain glove is "specially designed" for a particular sport, requires more than a mere determination of whether the glove or pair of gloves could possibly be used in a certain sport. In determining whether gloves are specially designed for use in sport, Customs considers the connection the gloves have to an identified sporting activity, the features designed for that sporting activity, and how the gloves are advertised and sold in relation to the named sport.

While the term "sport" is not defined by the tariff, in HQ 089849, dated August 16, 1991, Customs noted that common dictionaries defined the term "sport" as "an activity requiring more or less vigorous bodily exertion and carried on according to some traditional form or set of rules, whether outdoors, as football, hunting, golf, racing, etc., or indoors, as basketball, bowling, squash, etc." In *Newman Importing Company, Inc. v. United States*, 415 F. Supp. 375, Cust. Ct. 143, Cust. Dec. 4648 (1976), in finding backpacking to be a sport, the court determined that the term "sport" is not solely defined in terms of competitiveness, but also arises from the development and pursuit of a variety of skills. In this respect, in HQ 957848, dated August 10, 1995, Customs found hunting, fishing, canoeing, archery and similar outdoor activities to fall within the purview of "sport." *The American College Dictionary* (1970) defines the term "sport" as "a pastime pursued in the open air or having an athletic character." Likewise, *Webster's New Dictionary of the English Language* (2001) defines "sport" as:

1: a source of diversion: PASTIME

2: physical activity engaged in for pleasure.

Notably, the term "sport" appears to also encompass activities in which individuals engage professionally (i.e., professional sports).

In HQ 965131, dated October 25, 2001, Customs found that gloves designed for use in the sports of hunting or competitive shooting were designed for use in sports. In HQ 965131, marketing materials were submitted, promoting the benefits and design features of the gloves, which made them ideal for the outdoor sportsman. Moreover, the gloves were marketed through, and sold in, outdoor sporting goods stores that catered to hunters and competitive shooters. Likewise, in HQ 958892, dated October 4, 1996, we found that gloves which were close fitting and unlined with palmside polyurethane coated fabric and nylon knit fourchettes were specially designed for equestrian sports. Based on the detailed advertising, the term "All Purpose" was found to refer to the multiple equestrian activities for which the gloves could be used within the sport.

Comparatively, in HQ 954704, dated November 12, 1993, Customs ruled that lined leather gloves were not "specially designed" for use in the sport of snowmobiling. After examining the gloves and accompanying advertisements, we found that the gloves were equally suited for use as either motorcycle or snowmobile gloves. Therefore, the claim that the gloves were "designed, marketed and sold specifically as snowmobile gloves" was unsupported due to ambiguous advertising. Similarly, in HQ 088374, dated June 24, 1991, Customs ruled that the gloves at issue were not ski gloves, because the importer provided no evidence that they were principally used in, or designed for, the sport of skiing. In HQ 088374, there was no evidence of marketing or sale of the gloves as ski gloves, absent a hang tag including the word "ski." Moreover, in HQ 957848, dated August 10, 1995, Customs found that the advertisement accompanying the gloves showed the wearer engaged in non-sport activities such as writing, playing a trumpet, looking through a bag and taking pictures. In that ruling, the gloves (half-fingered with synthetic palm patch) were not considered to be designed, marketed and sold specifically for use as sports gloves.

In HQ 083450, dated August 25, 1989, in determining whether gloves were "specially designed for use in sports," Customs found that a glove designed as a multi-sport glove and used in many different sports did not necessarily satisfy the meaning of "designed for use in sports." In that ruling, we interpreted the term "specially designed for sports" to mean that the gloves must have special design features particular to the identified sport. Comfort, breathability and a reinforced thumb were not sufficient to show that special design features pertained specifically to any one of the sports cited (bicycling, cross-country skiing, ATV-motorcycling racing and boating).

Most recently, in HQ 965157, dated May 14, 2002, Customs ruled that five styles of gloves were not properly classified as gloves specially designed for use in sports. In that ruling, the gloves had some features associated with sports gloves, such as hook and loop closures, and synthetic materials. However, they were not classifiable under subheading 6216.00.4600, HTSUSA, because they were not sufficiently marketed, advertised and sold for use in the sports for which they were alleged to be designed. Likewise, in HQ 957848, dated August 10, 1995, we declined to classify the gloves considered therein (half-fingered with synthetic palm patch) as being "specially designed for sport," since they were not designed, marketed and sold specifically for use as sports gloves.

In this case, when NY F80802 was originally issued on January 11, 2000, Customs ruled that the gloves at issue could be used in competitive biking, which is commonly recognized as a sporting activity. However, our finding that the gloves "show a design for use in the sport of competitive biking," is insufficient to support a finding that they were "specially designed" for use in sports. To show that gloves are specially designed for use in a sport (in this case, competitive biking), it must be shown that in addition to their features, they are regularly advertised, marketed and sold in suitable and customary channels associated with the intended sport. While the submitted gloves may have shown characteristics useful in the sport of competitive biking, it was an error to conclude that the gloves were specially designed for competitive biking.

After review of NY F80802, we find no evidence to support the claim that the subject gloves are specially designed for the sport of competitive biking. There is no advertising or marketing material to establish any connection between the glove and the sport of competitive biking, and no indication that the subject gloves are sold to, and used by, competitive bikers. According to IronClad's marketing material, the company provides gloves for the workplace, revealing in part that:

> Ironclad Performance Wear has revolutionized the way the world looks at gloves. Incorporating the precise features and high tech synthetic materials designed for use in sports, we have created gloves that offer increased protection without compromising dexterity. Available in eight task specific models, Ironclad Gloves help you tackle whatever job is at hand.

See <http://www.iclad.com> Additional marketing information provides:

> The most important connection between you and your tools is your hands, that's why we put so much into our gloves. We studied hand bio-mechanics and engineered these gloves to specific movements and tasks you perform each day on the job. We asked the tradesmen just like you what they need from a pair of gloves and researched hundreds of materials to find the most durable and cool, yet supple. When you try on these gloves you will find that they feel unique and let your hand move the way no other glove does.
>
> In response to the demanding needs of the professional, IronClad Performance Wear offers the first and only line of task specific gloves * * *.

See <http://km01.com/about/ironclad.html> However, missing from the company's marketing materials, either printed or on its website, is any reference to the sporting activity of competitive biking. Research into the retail sale of IronClad gloves reveals that the gloves are sold at hardware stores and industrial supply stores which sell products to workers in a variety of trades. Yet, the gloves are not advertised as being sold at retailers such as sporting goods stores or bicycle shops, where competitive biking gloves would typically be purchased. See <http://www.iclad.com/new_retailloc.htm>

Similar to our findings in HQ 965157 (cited above), the marketing, advertising, and sales of the subject gloves fail to demonstrate that they have features specially designed for the sport of competitive biking. Unlike HQ 965131 (cited above), in which sufficient marketing materials were available and submitted promoting the benefits and design features of the gloves which made them ideal for the outdoor sportsman, such information does not appear to exist in this case. Rather, as in HQ 965157 and HQ 954704 (cited above), the claim that the subject gloves are specially designed for sport is unsubstantiated and ambiguous at best. Accordingly, the subject gloves are not properly classified in subheading 6216.00.46, HTSUSA, as gloves specially designed for use in sports.

While the gloves may indeed be used by some for an athletic activity, such as competitive biking, Customs finds that the subject gloves are not specially designed for use in competitive biking, nor are they marketed, advertised or sold in channels indicating their use in the sport of biking. The gloves at issue will primarily be worn for industrial work and any athletic use would be a secondary or fugitive use. The likelihood that the subject gloves could have a fugitive use does not remove them from classification according to their primary use, in this case—industrial use. The design, construction and function of the subject gloves for industrial use determines their classification, whether or not there is an incidental or subordinate function in sports.

As the gloves under consideration are not specially designed for use in sports, they are not properly classified in subheading 6216.00.4600, HTSUSA. The subject gloves are properly classified in subheading 6216.00.5820, HTSUSA, as "Gloves, mittens and mitts: Other: Of man-made fibers: Other: With fourchettes, Other."

Holding:

NY F80802, dated January 11, 2000, is hereby REVOKED.

The subject merchandise is classified in subheading 6216.00.5820, HTSUSA, which provides for "Gloves, mittens and mitts: Other: Of man-made fibers: Other: With fourchettes, Other." The applicable rate of duty is 21 cents per kilogram plus 10.5 percent *ad valorem* and the textile restraint category is 631.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The *Status Report on Current Import Quotas (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at www.customs.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER AND TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF NEOPRENE LUMBAR SUPPORT MERCHANDISE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of a ruling letter and revocation of treatment relating to the tariff classification of certain neoprene lumbar support merchandise.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is proposing to modify a ruling letter related to the classification of certain neoprene lumbar support merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Similarly, Customs intends to revoke any treatment previously accorded by it to substantially identical merchandise that is contrary to the position set forth in this notice.

DATE: Comments must be received on or before October 4, 2002.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at U.S. Customs Service, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Teresa Frazier, Textile Branch (202) 572–8821.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI") became effective. Title

VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility"**. These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify a ruling letter relating to the classification of certain neoprene lumbar support merchandise. Although in this notice Customs is specifically referring to Headquarters Ruling Letter (*HQ*) 952568, dated January 28, 1993, this notice covers any rulings on such merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the issues subject to this notice, should advise Customs during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Any person involved in substantially identical transactions should advise Customs during the notice period. An importer's failure to advise Customs of the substantially identical transactions or of a specific ruling not identified in this notice, may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In HQ 952568, dated January 28, 1993, Customs classified a neoprene lumbar support article (style 6902) in subheading 6212.90.0030, HTSUSA, which provided for brassieres, girdles, corsets, braces, suspenders,

garters and similar articles. Customs has reviewed the ruling and, with regard to the classification of this article, has determined that the ruling is in error. Accordingly, we intend to modify HQ 952568, as we find that the neoprene lumbar support article (style 6902) is classifiable within subheading 6307.90.9889, HTSUSA, which provides for an "other made up article * * * other * * * other."

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to modify HQ 952568 (see "Attachment A" to this document) and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in HQ 965743 (see "Attachment B" to this document).

Additionally, pursuant to 19 U.S.C. 1625(c) (2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: August 15, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 28, 1993.

CLA–2 CO:R:C:T 952568 CAB
Category: Classification
Tariff No. 6212.90.0030 and 6307.90.9986

MR. DONALD L. MANN
DURO-MED INDUSTRIES, INC.
301 Lodi Street
Hackensack, NJ 07602

Re: Modification of Pre-Classification (PC) 875982; Heading 6307; Heading 6212; back, knee, and ankle supports.

DEAR MR. MANN:

This letter is in response to your inquiry of September 9, 1992, requesting reconsideration of Pre-Classification (PC) 875982. No samples were submitted for examination.

Facts:

The articles at issue are depicted in a submitted copy of Duro-Med's 1992 catalog. Style 6902, a back support, described as a "Neoprene Sacro-Support" wraps around the lower back; contains an adjustable criss-cross rear design; and has a velcro means of closure. Style 6902 is manufactured in sizes small, medium, and large. The rear of the back support measures ten inches in length while the front of the article measures six inches in length. The catalog markets Style 6902 as a back support that primarily reflects body heat, improves circulation, protects injured areas, and acts as a comfort to the wearer.

Styles 6904, 6906, and 6055, are all knee braces used for support. The articles are marketed as a "Neoprene Knee Brace", a "Neoprene Wrap-Around Knee Brace", and a "De-

luxe Knee Brace", respectively. Style 6904 contains a hinged support bar that is twelve inches in length and has a size range of small, medium, and large. Style 6906 is marketed as an item that is appropriately used for sprains, inflammation and bursitis; produced in sizes regular and large; is nine inches long; has a velcro closure; and contains a support pad. Style 6055 contains a U-shape support pad, an open area around the knee joint, and is primarily used for strains, sprains, inflammation, and bursitis. Style 6908 described in the catalog as a "Neoprene Wrap-Around Ankle Brace" contains a velcro closure, is constructed so that the heel area is left open, and ranges in size from regular to large. The article is advertised as product that is appropriately used for sprains, arthritis, and tendonitis.

Issue:

Whether the merchandise in question is classifiable in Heading 6212, HTSUSA, which provides for body supporting garments, or in Heading 9021, as an orthopedic device, or in Heading 6307, HTSUSA, as an other made up article?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's, taken in order.

The articles at issue are potentially classifiable in various headings. One possible heading is Heading 6212, which provides for brassieres, girdles, corsets, braces, suspenders, garters and similar articles. Another possible heading is Heading 9021, HTSUSA, which provides for orthopedic appliances and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability. Finally, Heading 6307, HTSUSA, which provides for other made up articles, is the other potentially applicable heading for the articles in question.

The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN), although not legally binding, are the official interpretation of the tariff at the international level. The EN to Heading 9021 state the following:

> This heading does not include supporting belts or other support articles of the kind referred to in Note 1(b) to this Chapter, * * * (generally heading 62.12 or 63.07).

Note 1(b) of Chapter 90 maintains:

> This Chapter does not cover supporting belts or other support articles of textile material, whose intended effect on the organ to be supported or held derives solely from their elasticity (for example, maternity belts, thoracic support bandages, abdominal support bandages, supports for joints or muscles) (Section XI). You contend that the merchandise in question is properly classifiable in Heading 9021. The catalog you submitted specifically states that Styles 6902, 6904, 6906, and 6908 are constructed of neoprene, a form of rubber, which provides support to the wearer because of its elasticity. Finally, the EN to Heading 9021, HTSUSA, specifically state that textile support articles akin to the articles at issue are not provided for in the heading.

The EN to Heading 6212, HTSUSA, state in pertinent part:

> This heading covers articles of a kind designed for wear as body-supporting garments or as supports for certain other articles of apparel, and parts thereof * * *

In HRL 952390 dated December 16, 1992, Customs made a determination as to what type of support articles are specifically provided for in Heading 6212, HTSUSA. That ruling concluded:

> Stated simply, merchandise similar to the subject articles, is classifiable as belts of 6212, HTSUSA, if it functions with a dual purpose, in providing:
>
> 1. support for the body, or support for certain articles of apparel; and
> 2. a construction that allows the belt to be worn comfortably next to the wearer's skin, under other garments

This is the case for example, for such articles such as the brassieres, girdles, corset-belts, suspender-belts, hygienic belts, corrective belts, etc.

Style 6902, a support article for the lower back, is similar to the enumerated articles provided for in Heading 6212, HTSUSA, and it also meets the dual requirements listed in HRL 952390. The article in question is marketed and constructed as a product to bolster

the lower back. Also, a principal function of the article at issue is to reflect body heat which would be less effective if worn over other garments. Therefore, it appears that Style 6902 is designed to be worn next to the wearer's skin and not as an outerwear garment. Accordingly, PC 875982 properly classified Style 6902 in Heading 6212, HTSUSA.

The EN to 6307, HTSUSA, expresses the following:

> This heading covers made up articles of any textile material which are not included more specifically in other headings of Section XI or elsewhere in the Nomenclature.
>
> It includes, in particular:
>
> * * * * * * *
>
> (27) Support articles of the kind referred to in Note 1(b) to Chapter 90 for joints (e.g. knees, ankles, elbows or wrists) or muscles (e.g. thigh muscles), other than those falling in other headings of Section XI.

The EN to Heading 6307, HTSUSA, specifically provide for items such as Styles 6904, 6906, 6908. And as these items are made up textile articles not more specifically provided for elsewhere in the tariff, they are properly classifiable in the provision.

Holding:

PC 875982 correctly classified Style 6902 in subheading 6212.90.0030, HTSUSA, which provides for brassieres, girdles, corsets, braces, suspenders, garters and similar articles. The applicable rate of duty is 7 percent ad valorem, and the textile restraint category is 659. Style 6904, 6906, 6908, and 6055 are properly classifiable in subheading 6307.90.9986, HTSUSA, under the provision for other made up articles. The applicable rate of duty is 7 percent ad valorem.

In order to ensure uniformity in Customs classification of this merchandise and eliminate uncertainty, we are modifying PC875982 to reflect the above classification effective with the date of this letter. However, if after your review, you disagree with the legal basis for our decision, we invite you to submit any arguments you might have with respect to this matter for our review. Any submission you wish to make should be received within thirty (30) days of the date of this letter.

This notice to you should be considered a modification of PC875982 under 19 C.F.R. §177.9(d)(1). It is not to be applied retroactively to PC 875982 (19 C.F.R. §177.9(d)(2)) and will not, therefore, affect past transactions for the importation of your merchandise under that ruling. However, for the purposes of future transactions of merchandise of this type, PC 875982 will not be valid precedent. We recognize that pending transactions may be adversely affected by this modification, in that current contracts for importations arriving at a port subsequent to this decision will be classified pursuant to it. If such a situation arises, you may at your discretion, notify this office and apply for such relief from the binding effects as may be warranted by the circumstances. However, please be advised that in some instances involving import restraints, such relief may require separate approvals from other government agencies.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 965743 TF
Category: Classification
Tariff No. 6307.90.9889

DONALD L. MANN
DURO-MED INDUSTRIES, INC.
301 Lodi Street
Hackensack, NJ 07602

Re: Modification HQ 952568; classification of Neoprene Sacro-Support.

DEAR MR. MANN:

In Headquarters Ruling Letter HQ 952568, dated January 28, 1993 issued to you, Customs classified a Neoprene Sacro-Support in subheading 6212.90.0030, Harmonized Tariff Schedules of the United States Annotated, which provides for "brassieres, girdles, corsets, braces, suspenders, garters and similar articles."

We have reviewed this ruling and found it to be in error. Therefore, this ruling modifies HQ 952568.

Facts:

Style 6902, a back support, described as a "Neoprene Sacro-Support", wraps around the lower back; contains an adjustable criss-cross rear design; and has a Velcro® means of closure. Style 6902 is manufactured in sizes small, medium, and large. The rear of the back support measures ten inches in length while the front of the article measures six inches in length.

The catalog markets Style 6902 as a back support in a section labeled "Knee Immobilizers, Neoprene Rubber Supports, and describes the articles as follows:

Comfort, Support, Reflects Body Heat

* * * * * * *

Improves Circulation, Reduces Edema, Protects injured Areas

Issue:

Whether the neoprene back support (Style 6902) is classifiable in heading 6212, HTSUSA.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. Where goods cannot be classified solely on the basis of GRI 1, and if the headings or notes do not require otherwise, the remaining GRIs, 2 through 6, may be applied.

Additionally, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) are the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUSA. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Legal note 2 to Chapter 62 provides that Chapter 62 does not cover "orthopedic appliances, surgical belts, trusses or the like (heading 9021)." EN 62.12(7) includes certain belts. We note that EN 62.12 provides for "articles of a kind designed for wear as body-supporting garments or as supports for certain other articles of apparel, and parts thereof." The exemplars listed within EN 62.12 include, *interalia:*

(1) Brasseries of all kinds.
(2) Girdles and panty-girdles.
(3) Corselettes (combinations of girdles or panty-girdles and brasseries).
(4) Corsets and corset-belts. These are usually reinforced with flexible metallic, whalebone or plastic stays, and are generally fastened by lacing or by hooks.
(5) Suspender-belts, hygienic belts, suspensory bandages, suspender jock-straps, braces, suspenders, garters, shirt-sleeve supporting armbands and armlets.

(6) Body belts for men (including those combined with underpants)

(7) Maternity, post-pregnancy or similar supporting or corrective belts, not being orthopedic appliances of heading 90.21 (see Explanatory Note to that heading).

This EN also provides that articles of this heading may incorporate fittings and accessories of non-textile materials (e.g., metal, rubber, plastics or leather), and may be made of any textile material including knitted or crocheted fabrics (whether or not elastic).

In HQ 952390, dated December 16, 1992, Customs considered headings 6212 and 6307 for classifying the "X-Tend Back Protector", a stretch mesh fabric back support with a hook and loop closure system. In making its determination that the merchandise was not classified in heading 6212, Customs referred to HQ 952201, dated October 26, 1992, which was a classification ruling on similar lumbar support belts. Customs noted:

> The EN to heading 6212, HTSUSA, are clear in designating these articles as body-support garments or supports for other kind of apparel. The distinction centers on the fact that while the articles enumerated in the EN to heading 6212, HTSUSA, are principally used or worn as garments or garment accessories, those of heading 6307, HTSUSA, are not.
>
> Stated simply, merchandise similar to the subject articles, is classifiable as belts of 6212, HTSUSA, if it functions with a dual purpose, in providing:
>
> 1. support for the body, or support for certain articles of apparel; and
> 2. construction that allows the belt to be worn comfortably next to the wearer's skin, under other garments.
>
> This is the case for example, for such articles such as the brassieres, girdles, corset-belts, suspender-belts, hygienic belts, corrective belts, etc.

In the instant case, the subject merchandise is distinguishable from the enumerated articles of heading 6212, HTSUSA. Although style 6902 is designed to be worn next to the wearer's skin, it is neither a garment nor a garment-supporting article. Rather, it is marketed as a back support that reflects body heat, improves circulation, protects injured areas, and acts as a comfort to the wearer. Further, its principle use is to provide relief from pain in conjunction with supporting the wearer's lower back as a type of brace.

Therefore, as it is not *ejusdem generis* with the body supporting garments of heading 6212, HTSUSA, and since there are no headings that specifically provide for the goods, it is classifiable in heading 6307, HTSUSA, as other made up articles. Further, Customs has previously classified substantially similar neoprene lumbar support merchandise, which was designed to provide pain relief by heat retention purposes in heading 6307, HTSUSA. *See* HQ 965061, dated August 12, 2002

As style 6902 is substantially similar to the articles of HQ 965061, it is also classified as an "other made up article * * * other * * * other" within subheading 6307.90.9889, HTSUSA.

Holding:

HQ 952568, dated January 28, 1993, is hereby modified. At GRI 1, the Neoprene Sacro-Support" (Style 6902) is classified as an "other made up article * * * other * * * other" within subheading 6307.90.9889, HTSUSA. The general column one duty rate is seven percent ad *valorem*.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The *Status Report on Current Import Quotas (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at www.customs.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 101

CONSOLIDATION OF CUSTOMS DRAWBACK CENTERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to reflect a planned closure of the Customs Drawback Centers located at the ports of Boston, Massachusetts; Miami, Florida; and New Orleans, Louisiana. Because of a sustained decrease in the number of drawback claims and the amount of drawback payments, Customs is proposing a consolidation of the Drawback Program. The closing of the three Drawback Centers is part of the planned consolidation and is intended to promote operational efficiency in the processing of drawback claims.

DATE: Comments must be received on or before September 20, 2002.

ADDRESS: Written comments (preferably in triplicate) may be submitted to the U.S. Customs Service, Office of Regulations & Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Submitted comments may be inspected at the U.S. Customs Service, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Sherri Hoffman, U.S. Customs Service, Entry and Drawback Management, (202) 927–0300.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Consolidation of Drawback Centers

Since 1996, Customs has recognized a decrease in both the number of drawback claims and the amount of drawback payments. To verify these trends, and to determine how to most efficiently operate the Drawback Program, Customs conducted an internal evaluation of the program.

Customs also retained the services of an independent contractor to review the Drawback Program to ensure that the agency's findings were valid.

The findings of both the agency-led review and the independent contractor's assessment indicated the benefits of consolidating the processing of drawback claims by reducing the number of Drawback Centers.

In a Notice to Congress on March 12, 2001, filed in accordance with 19 U.S.C. 2075, Customs proposed the closure of four Drawback Centers. The Senate Finance and House Ways and Means Committees concurred with the proposal for consolidation, but with the recommendation that only three Drawback Centers be eliminated and the San Francisco Drawback Center remain operational. The Commissioner of Customs concurred with this recommendation and it was proposed to phase-in the closure of the Drawback Centers located at the ports of Boston, MA; Miami, FL; and New Orleans, LA. The remaining five Drawback Centers, located at the ports of New York, NY/Newark, NJ; Houston, TX; Chicago, IL; Los Angeles, CA; and San Francisco, CA would remain operational.

Closing of Drawback Centers to be Phased-In

To assist the remaining five Drawback Centers in accommodating an increased number of drawback claims, it is proposed to phase-in the closing of the three Drawback Centers. If, after further consideration and review of any comments submitted in response to the solicitation of comments set forth in this document, Customs decides to adopt as a final rule these proposed changes, it is proposed to phase-in the closing of the Drawback Centers as follows:

(1) The first Drawback Centers to close would be the centers at the ports of Boston, Massachusetts and New Orleans, Louisiana. These two centers would close 30 days from the date a final rule adopting these proposed changes is published in the Federal Register. At that time, drawback claims would no longer be accepted at the Boston or New Orleans Drawback Centers, and claims would be required to be filed at one of the five remaining Drawback Centers. Drawback claims submitted to the Boston or New Orleans Drawback Centers after this date would be rejected. Once rejected, it would be the responsibility of the claimant to ensure timely filing of the drawback claim at one of the five remaining Drawback Centers. Customs personnel at the ports of Boston and New Orleans would continue to process drawback claims that were submitted prior to commencement of this first phase-in period, for a period of 12-months. After this time, all remaining claims filed at the Boston Drawback Center prior to commencement of this first phase-in period, that have not been liquidated and require Customs review, would be forwarded to the New York/Newark Drawback Center for final processing. All remaining claims that were filed at the New Orleans Drawback Center prior to commencement of this first phase-in period, that have not been liquidated and require Customs review, would be forwarded to the Houston Drawback Center for final processing.

(2) The third Drawback Center to close would be the one located at the port of Miami, Florida. This center would close 180 days from the date a final rule adopting these proposed changes is published in the Federal Register. At that time, drawback claims would no longer be accepted at the Miami Drawback Center, and claims would be required to be filed at one of the five remaining Drawback Centers. Drawback claims submitted to the Miami Drawback Center after this date would be rejected. Once rejected, it would be the responsibility of the claimant to ensure timely filing of the drawback claim at one of the five remaining Drawback Centers. Customs personnel at the port of Miami would continue to process drawback claims that were submitted prior to commencement of this second phase-in period, for a period of 12-months. After this time, all remaining claims filed at the Miami Drawback Center prior to commencement of this second phase-in period, that have not been liquidated and require Customs review, would be forwarded to the Chicago Drawback Center for final processing.

Claimant Requirements to File in Designated Alternate Drawback Centers

In order to file a drawback claim at one of the five remaining Drawback Centers, a claimant would be required to possess either a district permit for the location at which the claim will be filed or a national permit. Claimants are reminded that a national permit requires use of the Automated Broker Interface of Customs Automated Commercial System when filing drawback claims. Claimants must ensure that all permit, license and bond requirements are met in accordance with the regulations. *See* parts 111 and 113 of the Customs Regulations.

Maintenance of Drawback Information

Throughout the staged consolidation period, claimants would be required to provide Customs with advance notification of any changes in the information provided regarding a drawback claim. This notification must be provided in accordance with part 191 of the Customs Regulations (19 CFR part 191).

EXPLANATION OF AMENDMENTS

Section 101.3(b)(1) of the Customs Regulations lists the Customs ports of entry. Eight ports are denoted with an asterisk that designates their status as a "Drawback unit/office." This document proposes to amend § 101.3(b)(1) to delete the asterisks in § 101.3(b)(1) next to the port listings for Boston, Miami and New Orleans.

COMMENTS

Before adopting this proposal as a final rule, consideration will be given to any written comments timely submitted to Customs, including comments on the clarity of this proposed rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 of the Treasury Department Regulations (31 CFR 1.4), and

§ 103.11(b) of the Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 799 9th Street, N.W., Washington, D.C.

THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Although this document is being issued with notice for public comment, because it relates to agency management and organization, it is not subject to the notice and public procedure requirements of 5 U.S.C. 553. Accordingly, this document is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Agency organization matters, such as this proposed closing of three Customs Drawback Centers, are not subject to Executive Order 12866.

DRAFTING INFORMATION

The principal author of this document was Ms. Suzanne Kingsbury, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 101

Customs duties and inspection, Customs ports of entry.

PROPOSED AMENDMENTS TO THE REGULATIONS

For the reasons stated above, it is proposed to amend part 101 of the Customs Regulations (19 CFR part 101) as follows:

PART 101—GENERAL PROVISIONS

1. The general authority citation for part 101 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States), 1623, 1624, 1646a.

Section 101.3 and 101.4 also issued under 19 U.S.C. 1 and 58b;

* * * * * * *

2. In § 101.3, the table in paragraph (b)(1) is amended by removing the plus signs in the "Ports of entry" column before the column listings for "Miami" under the state of Florida, "New Orleans" under the state of Louisiana, and "Boston" under the state of Massachusetts.

ROBERT C. BONNER,
Commissioner of Customs.

Approved: August 15, 2002.

TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, August 21, 2002 (67 FR 54137)]

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 02–89)

VIRAJ GROUP, LTD., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT, AND CARPENTER TECHNOLOGY, CORP., ET AL., DEFENDANT-INTERVENORS

Court No. 00–06–00291

(Dated August 15, 2002)

Ablondi, Foster, Sobin & Davidow (Peter Koenig), Washington, D.C., for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Lucius B. Lau,* Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *David W. Richardson,* Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant.

Collier Shannon Scott, PLLC (Robin H. Gilbert, Laurence J. Lasoff), Washington, D.C., for Defendant-Intervenors.

OPINION

CARMAN, *Chief Judge:* Pursuant to 28 U.S.C. § 1581(c) (2000), this Court has jurisdiction to review the Department of Commerce's approach to the Indian rupee's devaluation in Final Results of Redetermination Pursuant to Court Remand, *Viraj Group, Ltd. v. United States of America and Carpenter Technology, Corp., et al.,* Slip Op. 02–52 (CIT June 4, 2002) *("Remand Redetermination III").* This Court will sustain *Remand Redetermination III* unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

BACKGROUND

On June 4, 2002, this Court remanded to the Department of Commerce (Commerce) the Final Results of Redetermination Pursuant to Court Remand, *Viraj Group, Ltd. v. United States of America and Carpenter Technology, Corp., et al.,* Slip Op. 02–24 (CIT February 26, 2002) *("Remand Redetermination II").* This Court ordered Commerce to: "(1) apply a currency conversion methodology that reaches a more accurate dumping margin in this case by accounting for the rupee's depreci-

ation in Commerce's dumping margin calculations; (2) explain to this Court why such a methodology does or does not further the congressional goal of accuracy in dumping determinations; and (3) explain to this Court which method it chooses to apply in this case, apply that method, and give an explanation of its reasons for doing so." *Viraj Group, Ltd. v. United States,* 206 F. Supp. 2d 1340, 1344 (Ct. Int'l Trade 2002). On July 22, 2002, Commerce filed *Remand Redetermination III* with this Court.

In *Remand Redetermination III*, Commerce stated that this Court's instruction "implies that the Department must apply the exchange rate on a date that eliminates the impact of unpredicted currency fluctuations in the case where the amplitude appears to be neither negligible nor extreme." *Remand Redetermination III* at 4. Commerce therefore "adjusted its currency exchange methodology by using the exchange rate on the date of payment rather than the exchange rate on the date of sale." *Id.* In response to this Court's second instruction, Commerce explained that "the adjustment to the currency conversion methodology does not further the congressional goal of calculating an accurate dumping margin" because it does not use the exchange rate considered by the seller in making its pricing decision. *Id.* Finally, Commerce responded to this Court's third instruction by explaining that it had chosen to apply the exchange rate in effect on the date of payment in order to "obviate[] the Court's concern surrounding currency fluctuations between the date of sale and the date of payment and remove[] the Court's perceived distortion from the dumping margin calculation." *Id.* Accordingly, Commerce arrived at an amended dumping margin of zero percent for Viraj Group, Ltd.

ANALYSIS

In its remand results, Commerce appears unwilling to acknowledge the inaccuracy that may result when a currency devalues significantly over the course of an investigation or review and a respondent has not hedged against such a change. Commerce also appears unwilling to adequately explain why a steady, gradual, and significant devaluation should not be accorded similar consideration as that given a precipitous and large one. Clearly, however, it recognized such a problem in *Notice: Change in Policy Regarding Currency Conversions,* 61 Fed. Reg. 9,434, 9,435 n.2 (Mar. 8, 1996) *("Policy Bulletin 96–1").*

This Court must insist that Commerce adhere to the congressional intent of ensuring "that the process of currency conversion does not distort dumping margins." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, at 841 (1994). Commerce has a duty to determine dumping margins as accurately as possible. *See, e.g., NTN Bearing Corp. v. United States,* 74 F.3d 1204, 1208 (Fed. Cir. 1995); *Allied Tube & Conduit Corp.,* 127 F. Supp. 2d 207, 218 (Ct. Int'l Trade 2000). A zero percent dumping margin that accounts for the effects of a steady, gradual, and significant currency devaluation is more accurate than one that ignores its effects. Therefore, this Court concurs and sustains the results of *Remand Redetermination III* while

not endorsing the reasoning underlying the recalculation of the remand results.

CONCLUSION

Upon consideration of *Remand Redetermination III*, the record, and all other pertinent papers, the results of *Remand Redetermination III* are affirmed in their entirety.

(Slip Op. 02–90)

YANCHENG BAOLONG BIOCHEMICAL PRODUCTS CO., LTD., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT, AND CRAWFISH PROCESSORS ALLIANCE, ET AL., DEFENDANT-INTERVENORS

Court No. 01–00338

[Upon consideration of *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, and Final Partial Rescission of Antidumping Duty Administrative Review*, 66 Fed. Reg. 20,634 (Apr. 24, 2001), *amended by* 66 Fed. Reg. 30,409 (June 6, 2001) *(Final Results)*, Plaintiff's Motion for Judgment Upon the Agency Record, Defendant's Opposition to Plaintiff's Motion for Judgment Upon the Agency Record, Plaintiff's Reply Brief in Support of Motion for Judgment on the Agency Record, the record, and all other pertinent documents, Plaintiff's motion is denied and the contested rescission sustained.]

(Dated August 15, 2002)

deKieffer & Horgan (J. Kevin Horgan, John J. Kenkel), Washington, D.C., for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Mark L. Josephs*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Arthur D. Sidney*, Attorney, United States Department of Commerce, of Counsel, for Defendant.

Adduci, Mastriani & Schaumberg, L.L.P. (Will E. Leonard, Mark Leventhal, John C. Steinberger), Washington, D.C., for Defendant-Intervenors.

OPINION

CARMAN, *Chief Judge:* This matter comes before the Court on a motion for judgment on the agency record filed by Yancheng Baolong Biochemical Company, Ltd. ("Plaintiff" or "YBB"). Plaintiff challenges the Department of Commerce's ("Department" or "Commerce") decision to rescind its review with respect to YBB in *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, and Final Partial Rescission of Antidumping Duty Administrative Review*, 66 Fed. Reg. 20,634 (Apr. 24, 2001), *amended by* 66 Fed. Reg. 30,409 (June 6, 2001) *("Final Results")*. The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c) (2000).

BACKGROUND

On August 1, 1997, the Department published an antidumping duty order on freshwater crawfish tail meat from the People's Republic of

China ("PRC"). *See Notice of Final Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat From the People's Republic of China,* 62 Fed. Reg. 41,347–02 (Aug. 1, 1997), *amended by Notice of Amendment to Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Freshwater Crawfish Tail Meat From the People's Republic of China,* 62 Fed. Reg. 48,218 (Sept. 15, 1997). On September 30, 1999, the Department received requests for review from, among others, respondent YBB. The Department then conducted an administrative review of the antidumping duty order for the period September 1, 1998 through August 31, 1999 and published the preliminary results of review on October 11, 2000. *See Notice of Preliminary Results of Antidumping Duty Administrative Review and New Shipper Reviews, Partial Rescission of the Antidumping Duty Administrative Review, and Rescission of a New Shipper Review: Freshwater Crawfish Tail Meat From the People's Republic of China,* 65 Fed. Reg. 60,399 (Oct. 11, 2000) *(Preliminary Results).*

Based upon information obtained at verification, Commerce determined that YBB made no sales to the United States during the period of review. *Preliminary Results*, 65 Fed. Reg. at 60,401. Instead it became apparent to Commerce that another company, Asia Europe, had made the sales of subject merchandise. *See Memorandum for File through Maureen Flannery from Jacqueline Arrowsmith and Jonathan Lyons: Verification of Yancheng Baolong Biochemical and Asia Europe in the Second Administrative Review of Freshwater Crawfish Tail Meat from the People's Republic of China (PRC)* (Sept. 29, 2000), Prop. Doc. 61, Pl.'s Pub. App. 7 at 6 *("Verification Report").* Commerce therefore preliminarily rescinded the review with respect to YBB in accordance with 19 C.F.R. § 351.213(d)(3) (1999), which states that the Department may "rescind an administrative review, in whole or only with respect to a particular exporter or producer, if the Secretary concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise, as the case may be." *Id.* In addition, because Asia Europe failed to respond to the Department's antidumping questionnaire, the Department applied the PRC-wide rate to Asia Europe's sales of subject merchandise to the United States during the period of review. *See Preliminary Results*, 65 Fed. Reg. at 60,401.

YBB contested the Department's preliminary determination that it had made no sales to the United States during the period of review; it further argued that if the Department insisted upon Asia Europe as the seller, the Department should collapse the two affiliated companies into one entity. *See Memorandum from Joseph A. Spetrini to Bernard T. Carreau, Issues and Decision Memo for the Final Results of the Antidumping Duty Administrative Review and the Antidumping New Shipper Reviews of Freshwater Crawfish Tail Meat from the People's Republic of China* (Apr. 24, 2001), Def.'s Pub. App. Tab 12 at 26 *("Decision Memo").* After analyzing comments and rebuttals submitted by interested parties, Commerce published the *Final Results* on April 24, 2001, in which

it rescinded the review with respect to YBB and applied the PRC-wide rate to Asia Europe. *Final Results*, 66 Fed. Reg. at 20,635. Plaintiffs thereafter timely filed a summons and complaint challenging the final results.

DISCUSSION

I. Commerce's finding that YBB made no sales to the United States in the period of review is supported by substantial evidence on the record or otherwise in accordance with law.

A. Plaintiff's Contention

Plaintiff contends Commerce's holding that YBB did not make any sales to the United States in the period of review is not supported by substantial evidence on the record. Plaintiff claims that all transactions with U.S. customers involved only contacts with YBB. For support, Plaintiff points to exhibits of sales invoices, packing lists, bills of lading, a bank collection order, sales contracts, and certificates of origin issued by the Chinese government listing YBB as the exporter. Plaintiff acknowledges there is no information on the record, however, to explain why two types of documents—the "customs declaration sheet for exporting cargoes," and the "Foreign Exchanges Certification Sheet by the State Foreign Exchange Administration Bureau"—show Asia Europe as the exporter. (Pl.'s Br. in Support of Mot. for J. on the Agency Record at 8.)

B. Defendant's Contentions

Defendant contends substantial evidence supports Commerce's determination to rescind the administrative review of YBB because YBB did not make any sales of subject merchandise during the period of review. Defendant states that in order for Commerce to conduct an administrative review of a producer, there must be sales for export to the United States by the producer during the period of review. Absent such sales, Defendant asserts Commerce may rescind an administrative review with respect to a particular exporter or producer pursuant to 19 C.F.R. 351.213(d)(3). Defendant asserts that where an administrative review involves a non-market economy ("NME"), Commerce reviews NME trading companies rather than the manufacturers that supply them because it is the trading company that determines the price at which the subject merchandise is sold in the United States.

Defendant states that consistent with its NME practice, Commerce determined to rescind the review with respect to YBB because Asia Europe exported the subject merchandise to the United States. Defendant claims the following substantial record evidence supports Commerce's determination: (1) a management agreement between YBB and Asia Europe giving Asia Europe responsibility for export and sales activities as well as risk of loss, and agreeing that payment be made by the U.S. customer to Asia Europe's bank account; and (2) sales and shipping documents submitted by YBB demonstrating Asia Europe was the exporter.

Defendant states none of the documents to which YBB refers support its claim to have made sales to the United States.

C. Analysis

This Court finds Commerce has clearly set forth substantial evidence on the record to support its determination that YBB made no sales to the United States in the period of review. First, upon verification, Commerce determined that the sales in question for the period of review were recorded in Asia Europe's books. *Memorandum to Troy H. Cribb through Joseph A. Spetrini from Barbara E. Tillman, Yancheng Baolong Biochemical Products (Baolong Biochemical): Intent to Rescind Administrative Review* (Sept. 29, 2000), Prop. Doc. 69, Pl.'s Prop. App. 6 at 3–4 *("Rescission Memorandum").* Second, although much of the submitted export paperwork identified YBB as the seller, two documents for each of the sales identified Asia Europe as the seller. *Id.* Finally, documentation dated prior to the first sale at issue indicated that YBB was a member of the Baolong Group, which is the same as Asia Europe, making it reasonable for the Department to conclude Asia Europe controlled YBB's sales of subject merchandise to the United States. *Id.*; *see also Decision Memo* at 26.

Plaintiff has directed this Court's attention to exhibits of sales invoices, packing lists, bills of lading, a bank collection order, sales contracts, and certificates of origin issued by the Chinese government listing YBB as the exporter. This Court finds it reasonable that Commerce should be unpersuaded by such exhibits, as YBB submitted invoices for Asia Europe that indicated its sales were identical to those of YBB. *Id.* Commerce stated in its verification report that "[a]lthough [YBB] requested the review for the current [period of review] and claimed that it had made the sales of subject merchandise prior to the 'management agreement'. Asia [sic] Europe's worksheets and accounting records for the [period of review] indicated that it was Asia Europe who had actually made the sales under review." *Decision Memo* at 27 (quoting *Verification Report* at 6). Accordingly, this Court finds that substantial evidence on the record supports Commerce's determination that YBB made no sales of the subject merchandise during the period covered by the review.

II. Commerce's determination not to treat Asia Europe and YBB as a single entity is supported by substantial evidence on the record or otherwise in accordance with law.

A. Plaintiff's Contentions

Plaintiff contends that even if YBB were not the seller or exporter, YBB should be collapsed with its affiliated company, Asia Europe, into a single entity. For support, Plaintiff points to the Department's history of collapsing entities where one controls the other. Plaintiff claims the Department acknowledged in the *Rescission Memorandum* that YBB and Asia Europe were affiliated and that Asia Europe controlled YBB before the first sale to the United States. Plaintiff asserts Commerce should

have followed past precedent to collapse YBB and Asia Europe into one entity that requested an administrative review and exported to the United States during the period of review.

B. Defendant's Contentions

Defendant contends Commerce properly determined it could not treat Asia Europe and YBB as a single entity. Defendant asserts Commerce rejected YBB's collapsing argument because YBB failed to report the nature of its relationship with Asia Europe in a timely manner, and Asia Europe failed to respond to Commerce's questionnaires. Defendant argues that lack of available evidence on the record precluded Commerce from examining whether the two companies should have received a single rate.

C. Analysis

Commerce's decision not to treat Asia Europe and YBB as a single entity is supported by substantial evidence on the record or otherwise in accordance with law. In order to treat producers as a single entity and to determine a single weighted-average margin for that entity, Commerce must first determine whether the companies are affiliated pursuant to 19 U.S.C. § 1677(33)(F); second, it must determine whether the "producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities"; and third, it must determine that "there is a significant potential for the manipulation of price or production." 19 C.F.R. § 351.401(f). In determining the latter, Commerce may consider "(i) [t]he level of common ownership; (ii) [t]he extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and (iii) [w]hether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers." 19 C.F.R. § 351.401(f)(2).

Commerce provided two reasons it did not make such findings. First, neither YBB nor Asia Europe provided complete information on the nature of their relationship prior to verification. *See Decision Memo* at 28. In its supplemental questionnaire response submitted ten days prior to the beginning of verification, YBB reported that on July 25, 1999 it had instituted a joint management contract with its main supplier, Asia Europe. *See Rescission Memorandum* at 2; *see also Decision Memo* at 26, 28; *Verification Report* at 1–2. Commerce noted that

> [p]ertinent information regarding this contract was either presented, or discovered at verification, too late in the course of the proceeding for the Department to ask follow-up questions or to perform any meaningful analysis. Thus, the Department was precluded from requesting additional information or submitting supplemental questionnaires relevant to the issue of these companies' relationship and collapsing these two parties. Further, [YBB] had previously responded to the Department's question concerning the

> company's relationship with other producers or exporters of the subject merchandise, and whether they shared any managers or owners, by stating that "[YBB] has no relationship with other producers or exporters of the subject merchandise. It does not share any managers or owners."

See Decision Memo at 28. Second, Commerce stated that Asia Europe had failed to respond to Commerce's questionnaire, making "it impossible for the Department to analyze completely the company and its relationship with [YBB]." *Id.*

Plaintiff insists Commerce is required by precedent to treat YBB and Asia Europe as a single entity in this case. Plaintiff, however, focuses upon the apparent affiliation discovered at verification without persuading this Court that Commerce could have made the determinations required by 19 C.F.R. § 351.401(f). This Court finds that substantial evidence on the record supports Commerce's position that, absent evidence placed on the record by YBB and Asia Europe prior to verification, Commerce could not have made the determinations required for collapsing YBB and Asia Europe.

CONCLUSION

This Court finds to be supported by substantial evidence on the record or otherwise in accordance with law Commerce's determination that YBB made no sales of subject merchandise to the United States in the period of review. This Court also finds to be supported by substantial evidence on the record or otherwise in accordance with law Commerce's decision not to treat YBB and Asia Europe as a single entity. Accordingly, Plaintiff's motion for judgment upon the agency record is denied and the contested rescission sustained.

(Slip Op. 02–91)

THOMSON MULTIMEDIA INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–03–00277–S

[HMT on Imports does not violate the Uniformity and Port Preference clauses of the U.S. Constitution. Summary Judgment for defendant.]

(Dated August 21, 2002)

deKieffer & Horgan (J. Kevin Horgan), Professor Kevin C. Kennedy, Detroit College of Law at Michigan State University, of counsel, *Grunfeld, Desiderio, Lebowitz, Silverman, & Klestadt, LLP (Robert B. Silverman* and *Michael T. Cone),* of counsel, for plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Jeanne E. Davidson, Todd M. Hughes,* and *Jeffrey A. Belkin), Richard McManus* Office of General Counsel, United States Customs Service, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court on Plaintiff's motion and Defendant's cross-motion for judgment on the agency record pursuant to USCIT Rule 56.2. Plaintiff Thomson Multimedia Inc. ("Thomson") brought action against Defendant, the United States Customs Service ("Customs" or the "government"), to recover the Harbor Maintenance Tax ("HMT") collected on its electronics imports since 1992. Thomson argues that the HMT on imports is unconstitutional because: (1) the HMT on imports is not severable from the HMT on exports found to be unconstitutional in *United States Shoe Corp. v. United States,* 523 U.S. 360 (1998); (2) the HMT on imports violates the Uniformity Clause, U.S. Const. art. I, § 8, cl. 1; and (3) the HMT on imports violates the Port Preference Clause, U.S. Const. art. I, § 9, cl. 6.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(i), the court's residual jurisdiction provision. See *Thomson Consumer Electronics, Inc. v. United States,* 247 F.3d 1210 (Fed. Cir. 2001). Summary judgment is appropriate when the record, viewed in the light most favorable to the nonmoving party, shows no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. USCIT R. 56(c).

BACKGROUND

The HMT was enacted as part of the comprehensive Water Resources Development Act of 1986, Pub. L. 99–662, 100 Stat. 4082 ("WRDA"), and is specifically contained in the Harbor Maintenance Revenue Act of 1986, Pub. L. 99–662, 100 Stat. 4266. 26 U.S.C. §§ 4461–62 (1994). The HMT imposes an *ad valorem* charge of 0.125 percent of the value of the commercial cargo involved in any port use of federally maintained navigable waterways. 26 U.S.C. § 4461(b). The term "port" is defined as "any channel or harbor (or component thereof) in the United States, which * * * (i) is not an inland waterway, and (ii) is open to public navigation."

26 U.S.C. § 4462(a)(2)(A). The Harbor Maintenance Trust Fund ("HMT Fund") was established for revenue raised by the HMT to be expended on the operation and maintenance of channels and harbors. 26 U.S.C. § 9505.

The Inland Waterway Fuel Tax ("IWFT") is also a component of the WRDA and is contained in the Inland Waterways Revenue Act of 1978, Pub. L. 95–502, 92 Stat. 1696. The tax is imposed "on any liquid used during any calendar quarter by any person as fuel in a vessel in commercial waterway transportation." 26 U.S.C. § 4042(a) (1994). For the purpose of the IWFT, commercial waterway transportation only occurs on inland or intracoastal waterways, as defined in 33 U.S.C. § 1804 (1994).[1] *See* 26 U.S.C. § 4042(d)(1). The Inland Waterway Trust Fund ("IW Fund") was established for revenue raised by the IWFT to be expended on the inland and coastal waterways of the United States. 26 U.S.C. § 9506.

DISCUSSION

A. Severability

Thomson argues that the HMT on imports should be declared invalid because it is not severable from the unconstitutional HMT on exports. Thomson's claim fails because the Federal Circuit has "specifically held that the unconstitutional export provision in the HMT is severable from the remainder of the statute." *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1377 (Fed. Cir. 2000) *aff'ing* 23 CIT 613, 63 F. Supp. 2d 1332 (1999) (citing *Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1358 (Fed. Cir. 2000); *Carnival Cruise Lines, Inc. v. United States*, 200 F.3d 1361 (Fed. Cir. 2000)).

B. Uniformity Clause

The Uniformity Clause provides that, "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. Thomson argues that, because the HMT provides exemptions for certain ports, Customs does not apply the tax uniformly and, therefore, the HMT is unconstitutional.

1. Tax v. User Fee

As an initial matter, the government argues that the HMT on imports is a user fee, not a tax, and therefore the Uniformity Clause cannot apply. A user fee is a charge designed as compensation for government-

[1] 33 U.S.C. § 1804 identifies 27 rivers as inland and intracoastal waterways for the purposes of the IWFT. The list of these waterways includes segments of the: (1) Alabama-Coosa Rivers, (2) Allegheny River, (3) Apalachicola-Chattahoochee and Flint Rivers, (4) Arkansas River (McClellan-Kerr Arkansas River Navigation System), (5) Atchafalaya River, (6) Atlantic Intracoastal Waterway, (7) Black Warrior-Tombigbee-Mobile Rivers, (8) Columbia River (Columbia-Snake Rivers Inland Waterways), (9) Cumberland River, (10) Green and Barren Rivers, (11) Gulf Intracoastal Waterway, (12) Illinois Waterway (Calumet-Sag Channel), (13) Kanawha River, (14) Kaskaskia River, (15) Kentucky River, (16) Lower Mississippi River, (17) Upper Mississippi River, (18) Missouri River, (19) Monongahela River, (20) Ohio River, (21) Ouachita-Black Rivers, (22) Pearl River, (23) Red River, (24) Tennessee River, (25) White River, (26) Willamette River, and the (27) Tennessee-Tombigbee Waterway.

supplied services, facilities, or benefits. *See Pace v. Burgess,* 92 U.S. 372, 375 (1876). In *U.S. Shoe,* the Court rejected the argument the HMT on exports is a user fee finding that "the connection between a service the Government renders and the compensation it receives for that service must be closer than is present here." *U.S. Shoe,* 523 U.S. at 369 (holding that the HMT on exports is a tax). Defendant argues that the Supreme Court's user fee analysis was limited to the export provision and, therefore, is not binding.

Assuming *arguendo* that the Court's holding in *U.S. Shoe* applies only to the export provision, this court has already determined that the HMT on the whole is a tax. *United States Shoe Corp. v. United States,* 19 CIT 1284, 907 F. Supp. 408 (1995) (analyzing the HMT under *Massachusetts v. United States,* 435 U.S. 444 (1978)), *aff'd,* 114 F.3d 1564 (Fed Cir. 1994). In *Massachusetts,* the Court looked at three factors to determine whether a charge is a user fee: (1) the charge must not discriminate against the constitutionally-protected interest; (2) the implementing authority must base the charge upon a fair approximation of the use of some system; and (3) the charge must be structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred. 435 U.S. at 467–70.

In *U.S. Shoe,* this court found that the HMT failed the second and third prong of the Massachusetts Test. 19 CIT at 1292, 907 F. Supp. 2d at 415. "First, the charge is not based upon some fair approximation of the cost of the benefits port users receive from harbor maintenance and development projects." *Id.* (reasoning that low value bulk cargo importers and exporters use port facilities to a much greater extent than high value non-bulk cargo importers and exporters, yet, the cost to the latter is greater than that to the former). "Second, the charge is excessive in relation to the cost to the government." *Id.*[2] (reasoning that the tax is used to fund projects yet to be commenced, rather than to repay the government for services rendered). This analysis applies equally to the HMT on imports and exports and the court finds no reason to reject it. The court finds the HMT is a tax in its entirety, as it is not a fair approximation of the cost of the benefits to importers and the charge is excessive in relation to the cost to the government.

2. Geographic Discrimination

The Supreme Court has never relied upon the Uniformity Clause to invalidate a statute. The clause was first addressed in the *Head Money Cases,* where a federal statute levied a charge against carriers for each foreign passenger brought into the United States by seaport, though no charge was levied for foreign passengers crossing over inland borders. *Edye v. Robertson,* 112 U.S. 580, 594 (1884). In upholding the tax, the Court found that a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." *Id.* In *Knowl-*

[2] In *U.S. Shoe Corp. v. United States,* 114 F.3d 1564 (Fed. Cir. 1997), the Court affirmed this court's conclusion regarding the second prong of the Massachusetts Test. It found that, "the HMT is not based on a fair approximation of use and, as such, is not a permissible user fee." *Id.* at 1574.

ton v. Moore, the Court again rejected a Uniformity Clause claim on grounds that the clause merely limits "the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several States." 178 U.S. 41, 108 (1900). There have been few subsequent challenges under the Uniformity Clause.

In the *Reg'l Rail Reorganization Act Cases,* the Supreme Court addressed a similar uniformity provision found in the Bankruptcy Clause, Article I, Section 8, Clause 4 of the Constitution.[3] 419 U.S. 102, 159 (1974). The Court held, "[t]he uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." The Court extended this analysis to the Uniformity Clause in *Ptasynski v. United States,* 462 U.S. 74, 83 n.13 (1983) ("Although the purposes giving rise to the Bankruptcy Clause are not identical to those underlying the Uniformity Clause, we have looked to the interpretation of one Clause in determining the meaning of the other.").

In *Ptasynski,* the Court first laid out the essential test for determining the constitutionality under this clause. "Where Congress defines the subject of a tax in nongeographic terms, the Uniformity Clause is satisfied." *Id.* at 84. The court went on explain that, even if Congress frames a tax in geographic terms, the court may only declare a tax invalid if it results in "actual geographic discrimination." *Id.* at 85. This examination is undertaken with the understanding that "[t]he Uniformity Clause gives Congress wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems." *Id.* at 84. At issue in *Ptasynski* was a tax exemption for Alaskan oil[4] contained in the Crude Oil Windfall Profit Tax Act of 1980, 26 U.S.C. §§ 4986–4998 (repealed). The Court concluded that the Alaska oil exemption reflected "[Congress'] considered judgment that unique climatic and geographic conditions require that oil produced from this exempt area be treated as a separate class of oil." *Id.* at 79.

Under *Ptasynski,* this court reviews the HMT for *actual* geographic discrimination and gives considerable deference to Congress and its consideration of geographically isolated problems. The court will invalidate the HMT under the Uniformity Clause only where it finds that Congress' purpose was to promote regional favoritism or discrimination.[5]

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[3] "Congress shall have Power * * * To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States."

[4] Exempt Alaskan oil is defined by 26 U.S.C. § 4994(e) as, any crude oil (other than Sadlerochit oil) which is produced "(1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or (2) from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System." *Id.* at 78.

[5] Though Congressional deference is significant, it is not absolute. In *Downes v. Bidwell,* 182 U.S. 244 (1901), the Court found if Puerto Rico were a part of the United States for the purpose of the Uniformity Clause, a tax on goods originating in Puerto Rico would be a violation of the clause.

a. Alaska and Hawaii Domestic Cargo Exemption

Thomson challenges the special rule for Alaska and Hawaii domestic cargo contained in the HMT.[6] Thomson argues that the rule is a geographic exemption that results is discrimination. Thomson is likely correct that the exemption for Alaska and Hawaii cargo is framed in geographic terms. Plaintiff, however, fails to show actual favoritism or discrimination. Under *Ptasynski,* the court must analyze the geographic exemption to determine whether, by enacting the exemption, Congress was attempting to address a geographically isolated problem.

As noted in *Amoco,* 63 F. Supp. 2d at 1339 n.15, Congress included the Hawaii domestic cargo exemption in response to Congressional concern that Hawaii presented an isolated geographical problem.[7] The court finds that by providing an exemption for domestic cargo movement to and from Alaska and Hawaii, Congress was addressing a geographically unique problem in two states where domestic consumption is heavily dependent on ocean transportation. With Alaska and Hawaii's disproportionate dependence on ocean transportation for domestic consumption and transportation of merchandise to the remainder of the United States, Congress' exemption for the tax on the value of domestic merchandise is narrowly tailored toward relieving the burden of the *ad valorem* tax. Congress did not extend the exemption to foreign imports into Hawaii and Alaska or exports from Hawaii and Alaska.[8] As held in *Amoco,* "[t]he Alaska and Hawaii exemptions were enacted to prevent, not encourage geographic discrimination." *Amoco,* 63 F. Supp. 2d at 1339.

Conceding that Hawaii is likely dependent upon shipping for domestic transportation because, Thomson argues that, despite its remote Northern location, Alaska does not exhibit the features of an island and should not receive the same unique treatment as Hawaii. At oral argument, Thomson pointed out that the only evidence that Alaska is disadvantaged was provided by one Alaskan Senator near the close of debate

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[6] The HMT contains a special rule for merchandise transported to and from Alaska, Hawaii, and any possession of the United States, by which no tax is imposed on:

> (A) cargo loaded on a vessel in a port in the United States mainland for transportation to Alaska, Hawaii, or any possession of the United States for ultimate use or consumption in Alaska, Hawaii, or any possession of the United States,
>
> (B) cargo loaded on a vessel in Alaska, Hawaii, or any possession of the United States for transportation to the United States mainland, Alaska, Hawaii, or such a possession for ultimate use or consumption in the United States mainland, Alaska, Hawaii, or such a possession,
>
> (C) the unloading of cargo described in subparagraph (A) or (B) in Alaska, Hawaii, or any possession of the United States, or in the United States mainland, respectively, or
>
> (D) cargo loaded on a vessel in Alaska, Hawaii, or a possession of the United States and unloaded in the State or possession in which loaded, or passengers transported on United States flag vessels operating solely within the State waters of Alaska or Hawaii and adjacent international waters.

26 U.S.C. § 4462(b).

[7] "[V]irtually everything going in and out [of Hawaii] must travel by ship. * * * A port user fee, therefore, would be levied on over 80% of all the states goods and materials." Water Resources Conservation, Development, and Infrastructure Improvement Act of 1985: Hearing Before the House Committee on Ways and Means on H.R. 6, 99th Cong. 30 (1985).

[8] The special rule of intrastate passengers of U.S. flag vessels has not been addressed by the parties in any detail, but Hawaii is a series of islands and overland transportation in Alaska is problematic.

on the WRDA.[9] The inclusion of Alaska in the special rule, however, occurred following Senator Stevens' statements to the Senate, and following the detailed discussion on Hawaii's problems. It must be inferred that Congress found his argument that Alaska represented a geographically isolated problem convincing and not unlike the Hawaii situation. Consistent with *Amoco,* the court finds that Plaintiff fails to show actual discrimination or favoritism with respect to the special rule for Alaska and Hawaii domestic cargo.

b. Columbia River

Thomson next challenges what it argues is an implied exemption for a small portion of the Columbia River. The HMT defines the term port as including "the channels of the Columbia River in the States of Oregon and Washington only up to the downstream side of Bonneville lock and dam." 26 U.S.C. § 4462(a)(2)(C). Meanwhile, the IWFT on the inland waterway portion of the Columbia River only extends "[f]rom The Dalles at RM 191.5 to Pasco, Washington (McNary Pool), at RM 330, Snake River from RM 0 at the mouth to RM 231.5 at Johnson Bar Landing, Idaho." 33 U.S.C. § 1804(8). Thomson contends that, based on the geographic boundaries of these two provisions, the HMT and IWFT fail to cover a 47.5 mile stretch of Columbia River running upstream from the Bonneville lock and dam. Because the IWFT does not extend to the Bonneville lock, Thomson argues there are three ports along the Columbia River that are not subject to either the HMT or IWFT.[10] In support of their claim of actual discrimination, Thomson implied that the absence of legislative history explaining this anomaly somehow suggests that Congress had a hidden agenda to benefit ports along this stretch of river. Thomson's claim fails for several reasons.

First, the court will not presume that the absence of explanatory legislative history implies bad faith or discrimination. It is entirely likely that omission of this area from the WRDA funding scheme was an oversight. In *Amoco,* the court found that the so-called Columbia River exemption was more like a geographic definition than an exemption, with the section of the Columbia River that "is more like a port to be defined as a port and the portion of the river that is more like an inland waterway defined as such." *Amoco,* 63 F. Supp. 2d at 1340. Plaintiff submits no support for its contrary theory of intentional discrimination or favoritism.

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[9] Senator Stevens of Alaska described:

> Alaska's size, widely dispersed population, and geographic location combine to put fairly unique demands on our transportation system * * * Surface transportation in Alaska is almost exclusively waterborne. For much of Alaska waterborne shipping is the only way to get materials to communities where they will be used. These communities are almost entirely dependent on waterborne commerce for their basic supplies * * * We cannot recognize the unique needs of commerce with the islands and yet ignore the other State which is similarly situated. Waterborne shipments are an essential part of life in my home State. It is as much a part of Alaska's commerce as it is Hawaii's or any other place which is geographically isolated."

132 Cong. Rec. S2739–02, S2825, 99th Cong. 2d Sess. (Mar. 14, 1986).

[10] The United States argues that only two ports are exempt (Hood River and Bingen, but not Dalles), that neither is engaged in any significant shipping commerce, and cargo at those ports would be exempt from both charges only if no other domestic port was involved, and if the shipment entered and left the port through the downstream portion of the Columbia River.

Second, Plaintiff has failed to establish that these ports actually benefit from increased trade and, therefore, has failed to establish actual discrimination or favoritism. Thomson does not indicate that any of these "exempt" ports were defined as the subject of the HMT, nor does it make any showing that their features are consistent with those of an HMT port. Even if these ports were HMT ports for the purposes of the Uniformity Clause, Plaintiff has submitted no evidence that these three ports currently benefit or will benefit from any gap in the WRDA scheme. While the court does not know the purpose of this omission, the court finds no evidence suggesting actual discrimination and favoritism. As discussed in *Amoco,* the Columbia River exemption is benign.

c. Exemptions Related to Inland Waterway Ports

Thomson next challenges the HMT under the Uniformity Clause based on other aspects of the HMT's overlapping relationship with the IWFT, including: (1) a claim that there are 378 shallow draft ports that are not subject to the IWFT, but eligible to receive funds from the HMT Fund; (2) fund appropriations from the IW Fund are limited to specific lock and dam construction, rehabilitation, and modernization projects along the inland waterway system, whereas fund appropriations from the HMT Fund are used for projects relating to both harbor maintenance and inland waterway projects; (3) where any part of a vessel's itinerary includes an inland waterway, that vessel is exempt from the HMT; and (4) the IWFT exempts deep-draft vessels, enabling deep-draft vessels to avoid both taxes when part of its itinerary includes an inland waterway. Thomson argues that these exemptions create an unconstitutional competitive advantage for certain ports.

In *Augusta Towing Co. v. United States,* 5 Cl. Ct. 160 (1984), the United States Claims Court upheld the IWFT definition of inland waterway against a Uniformity Clause challenge, on the grounds that defining inland waterway as 26 specific inland waterways was rational and not discriminatory. At oral argument, Thomson attempted to distinguish the present case from *Augusta Towing,* contending that the Uniformity Clause analysis was different in *Augusta Towing* because the charge was found to be a user fee. Whether it was required to do so or not, the court examined the IWFT, "to determine whether the tax is uniform," "assuming that the Uniformity clause is applicable." *Id.* at 163 (emphasis added). The court found, "that the selection of the 26 waterways was not the result of any [deliberate combinations of states in Congress to secure improper advantages to themselves at the expense of other states]." *Id.* at 171. The court finds *Augusta Towing* persuasive.

As with the definition of inland waterway under the IWFT, the HMT definition of port use as, "any channel or harbor * * * which (i) is not an inland waterway, and (ii) is open to public navigation," 26 U.S.C. § 4462(a)(2)(A), does not appear to be the result of deliberate discrimination in favor of a majority of states. The fact that various exemptions may interact to create competitive advantages for certain ports is not deliberate geographic favoritism or discrimination. Plaintiff submits no

evidence that deep draft vessels actually benefit from the exemption. Importantly, Plaintiff does not explain how the purpose of a vessel-specific exemption could be construed as geographically discriminatory in the sense required for a successful Uniformity Clause challenge.

Further, in order to be defined as a port under the HMT, the facility must receive federal funding. 26 U.S.C. § 4462(a)(1)(B). Plaintiff does not claim that 378 shallow draft ports unfairly receive funding but, instead, argues that some facilities are "eligible" to receive funding and, therefore, may receive the benefit of HMT funds without being subject to HMT charges. Plaintiff cites no support for the proposition that these facilities presently benefit from any discrimination, much less geographic discrimination. The court finds that Thomson has failed to show the actual geographic discrimination or favoritism prohibited by the Uniformity Clause.

C. Port Preference Clause

The Port Preference Clause provides that, "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another." U.S. Const. art. I, § 9, cl 6. "The origins of the Uniformity Clause are linked to those of the Port Preference Clause. The two were proposed together, and reported out of a special committee as an interrelated limitation on the National Government's commerce power. They were separated without explanation. * * *" *Ptasynski,* 462 U.S. at 81 n.10 (citations omitted). "The preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated, as respected their operation, as one and the same thing, and embodied the same conception."[11] *Knowlton,* 178 U.S. 106.

As with the Uniformity Clause, "[the Port Preference Clause] has never been relied on by the federal judiciary to hold an act of Congress unconstitutional." *Kansas v. United States,* 16 F.3d 436, 439 (D.C. Cir. 1994), *cert. denied,* 513 U.S. 945 (1994). In the authoritative case on the Port Preference Clause, *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 59 U.S. 421 (1856), the Supreme Court interpreted the clause narrowly, holding that direct discrimination, and not disparate effects, violates the Port Preference Clause. *Wheeling,* 59 U.S. 421. Further, "[w]hat is forbidden is not discrimination between individual ports within the same or different States, but discrimination between States." *Wheeling,* 59 U.S. at 424. More recently, in *Houston v. Federal Aviation Admin.,* 679 F.2d 1184, 1197 (5th Cir. 1982), the 5th Circuit found that government actions do not violate the Port Preference Clause even if they result in some detriment to a port, where they occur (1) as incident to some otherwise legitimate government act regulating commerce or

[11] There are two significant differences, however, in the application of the Port Preference Clause. First, it forbids only discrimination along state lines, while the Uniformity Clause does not have this limitation. Second, the Port Preference Clause is a limitation on the regulation of commerce, as well as taxation.

(2) more as result of accident of geography than from intentional government preference.

In *Amoco,* 63 F. Supp. 2d at 1341, this court found that a violation of the Port Preference Clause requires that an act of Congress explicitly discriminate against the ports of a particular state.[12] In that case, Amoco never alleged that Congress explicitly discriminated against any particular state. In the present case, however, Thomson alleges explicit discrimination by Congress. First, it alleges that the exemption for domestic cargo at the ports of Alaska and Hawaii provides an explicit preference *for* those two states and against the remaining forty-eight. Thomson next argues that by defining port to exclude ports along inland waterways, Congress provides an explicit preference for all of the ports of those twenty states that only have inland waterway ports.

The court finds that Thomson's reading of the Port Preference Clause fails to acknowledge the intent of the framers. The clause, "gave small states protection against deliberate discrimination against them by other, more powerful states." *Houston,* 679 F.2d at 1198. In devising an appropriate test for determining a violation of the Port Preference Clause, the court follows the clear intent of the framers and the guidance of the Supreme Court in *Ptasynski,* 462 U.S. at 84–85, regarding its test for determining a violation of the Uniformity Clause.

Where an act of Congress does not provide a preference for all of the ports of one state, over all of the ports of another, there is no violation of the Port Preference Clause. *See Wheeling,* 59 U.S. at 424. But, where Congress does provide such a preference, the Court must look closely at the legislation to discern whether Congress intended to channel commerce toward all of the ports of a favored state or, instead, was attempting to address a geographically isolated problem. *See Ptasynski,* 462 U.S. at 84–85.

1. Exemption for Hawaii and Alaska

Thomson contends that the Port Preference Clause is a complete barrier to any express preference for all of the ports of one state over all of the ports of another. By exempting Alaska and Hawaii domestic cargo, Congress arguably granted an express preference to those two states. Under Thomson's interpretation of the Port Preference Clause, there is no room for Congress to address a geographically isolated problem exacerbated by a generally applicable statute, if Congress must utilize state borders to do so.

In *United States v. Lopez,* 514 U.S. 549, 587 (1995) (Thomas, C., concurring), Justice Thomas stated, "the more natural reading is that the (Port Preference Clause) prohibits Congress from using its commerce power to channel commerce through certain favored ports." Far from channeling commerce through all the ports of Alaska and Hawaii and away from all of the states where HMT ports are not exempt from do-

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[12] The court cited *City of Milwaukee v. Yeutter,* 877 F.2d 540, 546 (7th Cir. 1989) ("For two hundred years courts have understood that only explicit discrimination violates the Port Preference Clause").

mestic movement of cargo, Congress appeared to address a problem of geographic isolation. The Alaska and Hawaii domestic cargo exemption is designed to offset the increased costs of the HMT associated with domestic cargo in the two states that are not contiguous with the rest of the United States. In its deliberations, Congress considered whether the HMT would have a disproportionate impact on domestic commerce in Alaska and Hawaii. Water Resources Conservation, Development, and Infrastructure Improvement Act of 1985: Hearing Before the House Committee on Ways and Means on H.R. 6, 99th Cong. 30 (1985).

That Congress attempted to address an isolated problem of geographical origin is supported by two components of the Alaska and Hawaii domestic cargo exemption. First, as is clear from the statute, only domestic cargo movements, not international cargo movements, are exempt. 26 U.S.C. § 4462(b)(1). The ports of Alaska and Hawaii are given no competitive advantage in attracting imports from foreign countries or in exporting, as internationally they are similarly situated to the remainder of the United States. Thomson does not suggest that shippers channel domestic cargo away from other ports, toward the limitedly exempt ports of Alaska and Hawaii. Second, all ports in all states are exempt from the HMT on domestic merchandise that travels to or from Alaska or Hawaii. This aspect of the exemption clearly indicates that Congress intended to encourage domestic commerce with Alaska and Hawaii because of their isolation, rather than channel commerce toward the ports of favored states. The court finds that the Alaska and Hawaii domestic cargo exemption is narrowly tailored to meet the isolated problems of two states that are uniquely dependent on ocean transportation for domestic merchandise and would be disproportionally impacted by the HMT, save for the exemption, and, therefore, the exemption does not violate the Port Preference Clause.[13]

2. Exemption for Ports Along Inland Waterways

Thomson argues that by defining ports to exclude ports located along inland waterways, and thus exempting twenty states that only contain inland waterways ports, the HMT provides an explicit preference for all of the ports of those states, in violation of the Port Preference Clause. Thomson's reading of the Clause is inconsistent with the holding in *Augusta Towing,* 5 Cl. Ct. 160, where a challenge to the IWFT was brought on the grounds that all of the ports in certain states are being taxed, while none of the ports of other states are being taxed. In that case the court found, "[w]hile it may be true that the ports of some states are indirectly disadvantaged compared to the ports of other states because fuel used on the waterways leading to them is taxed, this fact does not bring the tax within the constitutional prohibition. *Id.* at 165. Further, "[a]cts of Congress that only incidentally benefit some ports at the expense of others do not confer a preference on the ports of one state over those of another within the meaning of the clause." *Augusta Towing,*

[13] The court does not reach the issue of the severability of the exemption from the HMT statute.

5 Cl. Ct. at 165. The court sees no reason why these principles should not apply here.

In enacting the HMT, Congress taxed cargo at ports of every coastal state in the same manner, excluding from the definition of "port" those ports located along inland waterways, for the purpose of avoiding double taxation at ports that are on waterways subject to the IWFT. Making fuel on vessels at certain ports located along inland waterways subject to the IWFT, and cargo at certain deep-water ports subject to the HMT, is a rational attempt by Congress to avoid the adverse consequences of different laws operating on merchandise on the same vessel. The HMT definition of port use with its exemptions represents a rational choice by Congress and is not improperly geographically discriminatory. It is thus constitutional under the Port Preference Clause.

CONCLUSION

Accordingly, the court finds that the HMT on imports is a tax, severable from the unconstitutional HMT on exports, and constitutional under the Port Preference Clause and Uniformity Clause. It is hereby ordered that Defendant's motion for summary judgment is granted.

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